TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~266.~~ 46

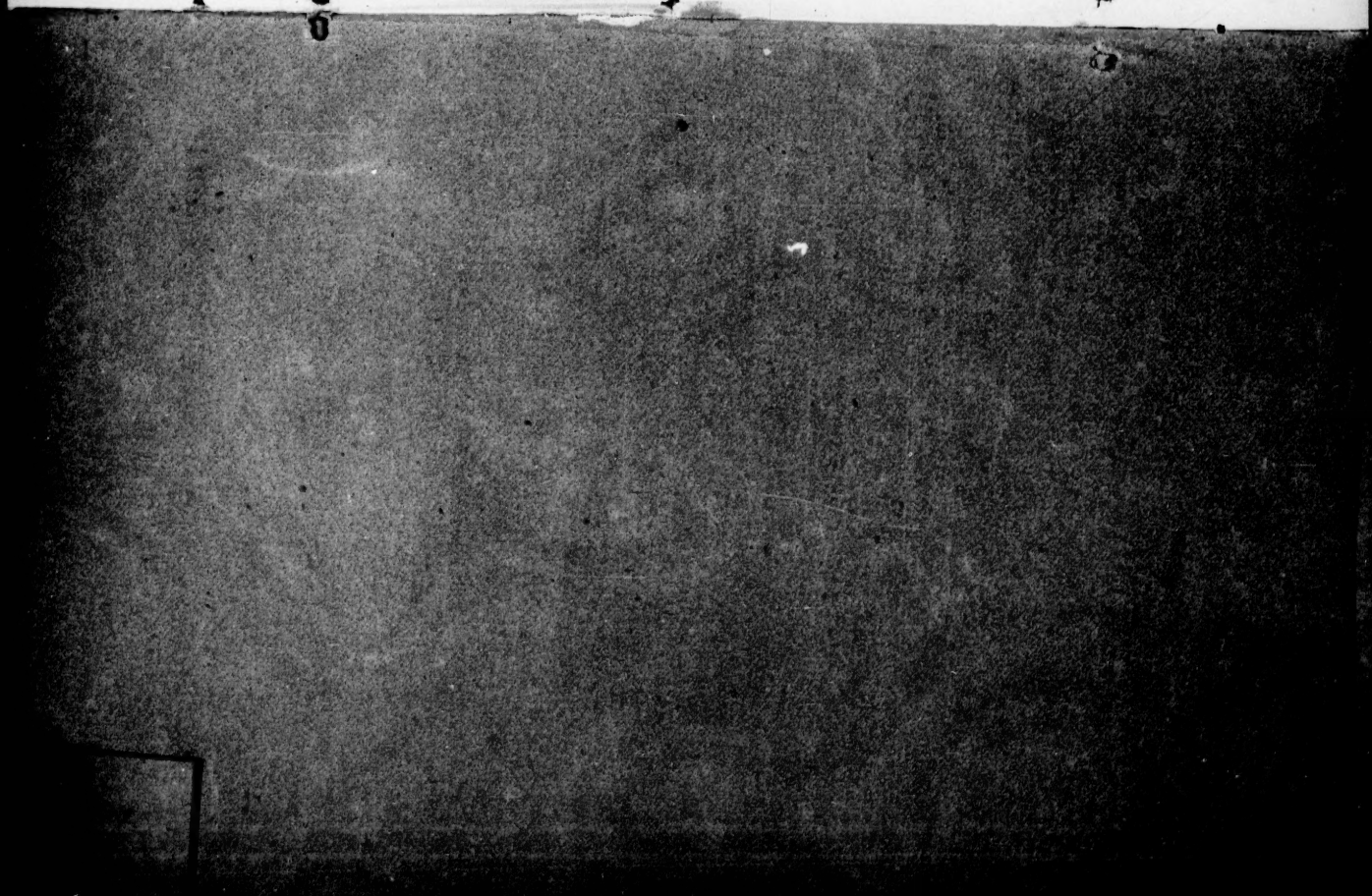
DAVID A. COWELL, PLAINTIFF IN ERROR,

vs.

THE COLORADO SPRINGS COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

FILED OCTOBER 16, 1876.



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1 In the supreme court of the Territory of Colorado.

Pleas in the supreme court of the Territory of Colorado, held at the city of Denver, in said Territory, at the February term of said court, began on the second Tuesday of February, in the year of our Lord one thousand eight hundred and seventy-six, according to law.

Present, Hon. Moses Hallett, chief justice; Hon. Andrew W. Brazee, associate justice; Hon. Amherst W. Stone, associate justice; C. C. Tompkins, esq., United States marshal, and Jno. W. Webster, clerk of said court.

2 DAVID A. COWELL, PLAINTIFF IN ERROR,
vs.
THE COLORADO SPRINGS COMPANY, DEFENDANT in error.

Error to the supreme court of Colorado Territory.

3 TERRITORY OF COLORADO,
County of Pueblo, ss:

Pleas before the honorable Moses Hallett, chief justice of the supreme court of Colorado Territory, and judge of the district court of the third judicial district of said Territory within and for the county of Pueblo in said Territory, and at a term thereof begun and held at the court-house in the city of Pueblo, in said Pueblo County, on Tuesday the second day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Present, Hon. Moses Hallett, judge of said court; J. W. Henry, district attorney of the third judicial district of Colorado Territory; Geo. A. Bute, clerk of said court; Abe R. Ellis, sheriff of Pueblo County in said Territory.

Be it remembered that heretofore, to wit, on the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and sev-
4 enty-four, the Colorado Springs Company, by J. M. Davidson, its attorney, filed in the office of the said clerk a certain transcript which is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of El Paso, ss:

Pleas in the district court of the third judicial district of Colorado Territory within and for the county of El Paso. At a term thereof begun and held at the court-house in Colorado Springs, in said county and Territory aforesaid, on Tuesday, the fourth day of November, A. D. one thousand eight hundred and seventy-three (it being the November term, A. D. 1873, of said court).

Present, Hon. Moses Hallett, chief justice of the supreme court of Colorado Territory and judge of the district court of the third judicial district of said Territory; J. W. Henry, district attorney of the third judicial district of said Territory; Geo. A. Bute, clerk of said court; Robert Donnelly, sheriff of El Paso County.

When the following proceedings, among others, were had and done, to wit:

5 COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

This day came the said plaintiff, by its attorney, J. M. Davidson, and the said defendants, by their attorney, William Chase, also came; and, on

motion of said plaintiff, it is ordered by the court that the said defendants plead to the plaintiff's declaration herein by the incoming of court on the sixth instant.

And afterwards, to wit, on the sixth day of November, A. D. 1873, the same being one of the days of said term of said court, the following, among other proceedings, were had and entered of record, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

This day the time heretofore and on yesterday given the said
6 defendants to plead to the plaintiff's declaration herein is extended by the court to the seventh instant.

And afterwards, to wit, on the eighth day of November, A. D. one thousand eight hundred and seventy-three, the same being one of the days of said term of said court, the following among other proceedings were had and entered of record, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

This day came the said plaintiff by its attorney, J. M. Davidson, and the said defendants by their attorney, G. W. Miller, also came, and the said defendants' demurrer to the said plaintiff's declaration herein came on to be heard, and after argument of counsel, the court being fully advised in the premises, it is considered by the court that said demurrer be overruled, and thereupon, on motion of the said plaintiff, it is ordered by the court that the said defendant plead to the plaintaiff's declaration herein by the incoming of court on the tenth instant.

7 And afterwards, to wit, on the tenth day of November, A. D. one thousand eight hundred and seventy-three, the same being one of the days of said term of said court, the following among other proceedings were had and entered of record, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

This day came the said plaintiff by its attorney, J. M. Davidson, and the said defendants by their attorney, Geo. W. Miller, also came, and this cause came on for trial, and thereupon came a jury, twelve good and lawful men, to wit, L. Bell, John Wolfe, E. H. Talbert, Milton Irvin, Adam Augustine, Milo Case, R. B. Demasters, Frank Agnew, L. C. Ellington, Allen Teachout, John Beall, W. F. Dixon, who being duly empaneled and sworn to well and truly try the issues joined, and a true verdict render according to the evidence, heard part of the plaintiff's testimony.

8 And afterwards, to wit, on the eleventh day of November, A. D. one thousand eight hundred and seventy-three, the same being

one of the days of the said term of said court, the following among other proceedings were had and entered of record, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

Now again came the said parties by their respective attorneys, and the jury heretofore and on yesterday sworn and empaneled in this cause also came, to wit, L. Bell, John Wolfe, E. H. Talbert, Milton Irvin, Adam Augustine, Milo Case, R. B. Demasters, Frank Agnew, L. C. Ellington, Allen Teachout, John Beall, W. F. Dixon, who, after hearing all the evidence of witnesses and the arguments of counsel and the instructions of the court, retired to their rooms in charge of a sworn bailiff.

Afterwards, and upon the same day, the jurors aforesaid returned into court their verdict in this cause as follows, to wit:

9 "We the jury find the defendant guilty, and find that the plaintiff is the owner in fee of the property in controversy."

And afterwards, to wit, on the fifteenth day of November, A. D. one thousand eight hundred and seventy-three, the following among other proceedings were had and entered of record, the said day being one of the days of said term of said court, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

Now, on this day came the said defendants, by Geo. W. Miller, their attorney, and move the court for a new trial of this cause, and the said plaintiff by J. M. Davidson, its attorney, also came, and after argument of counsel, the court being fully advised in the premises, it is considered by the court that said motion be overruled.

It is thereupon considered by the court that the said plaintiff
10 do recover against the defendants the possession of the premises according to the verdict of the jury heretofore rendered herein, and that he have a writ of possession therefor according to the force, form, and effect of the said recovery.

And it is furthered considered that the plaintiff do have and recover of and from the defendants its costs and charges by it about its suit in this behalf expended, and that execution issue therefor.

Then again came the defendants, by their said attorney, and now here pay all the costs which have accrued, and thereupon move the court to set aside the judgment rendered herein, which is granted by the court, and it is ordered that the judgment as above rendered herein be set aside and that a new trial of this cause be awarded.

And afterwards, to wit, on the twenty-fourth day of April, in the year of our Lord one thousand eight hundred and seventy-four, the said day being one of the days of the April term, A. D. one thousand eight hundred and seventy-four, of said court, begun and held at the court-
11 house in Colorado Springs, in said El Paso County, and Territory aforesaid, on Tuesday, the twenty-first day of April, A. D. one thousand eight hundred and seventy-four.

Present: Hon. Moses Hallett, chief justice of the supreme court of

Colorado Territory and judge of the district court of the third judicial district of said Territory; J. W. Henry, district attorney of the third judicial district of said Territory; Geo. A. Bute, clerk of said court; Robert Donnelly, sheriff of El Paso County.

The following among other proceedings were had and entered of record, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

This day came the said plaintiff, by its attorney, J. M. Davidson, and the said defendants by their attorney, Geo. W. Miller, also came, and this cause came on for trial, then came a jury, twelve good and lawful men, to wit, Solon Mason, Adam G. Hill, D. S. McCracken,
12 George Swan, J. W. Bates, Royal Jacobs, G. W. Cook, Joseph Adams, S. C. Sessions, L. D. Simpson, Josiah Riggs, A. Welch, who being duly empaneled and sworn to well and truly try the issue joined and a true verdict render according to the evidence, heard part of the evidence of witnesses.

And afterwards, to wit, on the twenty-fifth day of April, A. D. one thousand eight hundred and seventy-four, the said day being one of the days of the said April term, A. D. one thousand eight hundred and seventy-four, of said court, the following among other proceedings were had and entered of record, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

This day came again the parties by their respective attorneys, and the jury heretofore and on yesterday sworn and empaneled in this cause, to wit, Solon Mason, Adam G. Hill, D. S. McCracken, Joseph Adams, Geo. Swan, J. W. Bates, Royal Jacobs, G. W. Cook, S. C. Sessions, L.
13 D. Simpson, Josiah Riggs, A. Welsh, also came, who after hearing all the evidence of witnesses and the arguments of counsel and the instructions of the court, retired to their room in charge of a sworn bailiff.

And afterwards, to wit, on the twenty-seventh day of April, A. D. one thousand eight hundred and seventy-four, the said day being one of the days of said term of said court, the following among other proceedings were had and entered of record, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

This day came again the said parties by their respective attorneys, and the said jury heretofore and on Friday last sworn and empaneled in this cause, to wit, Solan Mason, Adam G. Hill, D. S. McCracken, Geo. Swan, J. W. Bates, Royal Jacobs, G. W. Cook, Josiah Adams, S. C. Sessions, L. D. Simpson, Josiah Riggs, A. Welch, returned into court, and the said jurors being unable to agree upon a verdict in this cause were discharged from giving any verdict herein.

14 And afterwards, to wit, on the first day of May, A. D. one thousand eight hundred and seventy-four, the same being one of the days of the said April term, A. D. one thousand eight hundred and seventy-four, of said court, the said Colorado Springs Company filed in said court its petition for change of venue, which said petition is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of El Paso, ss:

In the district court of the April term, A. D. one thousand eight hundred and seventy-four.

COLORADO SPRINGS
vs.
DAVID A. COWELL ET AL. } Ejectment.

The Colorado Springs Company, plaintiff in the above-entitled suit, respectfully represents to this honorable court that it is the fear of plaintiff that plaintiff cannot have a fair trial in said court where the above suit is now pending, on account that the inhabitants of said county are prejudiced against the plaintiff so that plaintiff cannot expect to have a fair trial.

Plaintiff further represents that the fact upon which such fear is
15 based are these, as follows: That since the trial of said suit, which was had at the November term, A. D. one thousand eight hundred and seventy-three, the pendency of said suit has become generally known throughout said county, and the merits of said cause have been discussed, and an opinion formed in relation thereto by many of the inhabitants of said county which is adverse to the plaintiff.

Plaintiff further represents that it is a corporation, and that many of the inhabitants of said county are prejudiced against it on that account as plaintiff believes.

Plaintiff further represents that the above suit was brought to recover land, on account of a breach of a condition in the deed conveying the same to defendant Cowell, and executed by plaintiff, and that said land is situated in the town of Colorado Springs, in said county, and that a great portion of the land in said town is held by grantees of the plaintiff under deeds with conditions therein of a like nature to the condition for breach of which the above suit was brought.

16 Plaintiff further represents that it is claimed by many of the inhabitants of said county, and asserted by them, that such conditions are illegal and unjust, and that said conditions were inserted in such deeds for the purpose of defrauding the grantees of the land thereby conveyed.

Plaintiff further represents that it has brought five suits in ejectment in this court for recovery of land in said town, so conveyed under conditions as aforesaid, and that such suits have been brought for breach of such conditions.

Plaintiff further represents that at the time of the commencement of said suits the defendants therein were proprietors and managers of houses of public resort, wherein many of the inhabitants of said county were accustomed to congregate daily, and that three of said defendants are now proprietors and managers of said houses of public resort; that the same are still open to the public, and that many of the inhabitants of said county now do congregate in said houses, so that the defendants

have had ample opportunity to converse with the people of said county in relation to said suits,

17 Plaintiff further represents that there is published in said town for about the term of six months last past a weekly newspaper, called the Mountaineer; that at various times since said publication was commenced said paper has published statements to the effect that said conditions in said deeds were illegal and unjust, and that it was the aim of plaintiff to regain by unfairness and mean advantage lands which had been conveyed by plaintiff for a valuable consideration.

Plaintiff further represents that since the trial of the above cause at this term of said court said paper, bearing date April thirtieth, A. D. one thousand eight hundred and seventy-four, contained an article in relation to this suit, which, among other things, stated: "This we think will be the end of such trials, as we doubt if any twelve men, in any county, can be found to sustain such a clause as is embodied in our deeds."

Plaintiff further represents that said paper is circulated and distributed throughout the town of Colorado Springs, and that copies

18 of the same are exposed for sale at divers stores and public places in said town.

Plaintiff further represents that at the above term of said court the above cause was tried by a jury, and that said jury did not agree upon a verdict, although, as this plaintiff believes, the evidence was amply sufficient to warrant a verdict for plaintiff.

Plaintiff further represents, that by reason of the publications and matters aforesaid, and by reason of the additional notoriety which said suit has attained by the last trial therein had as above, the prejudice against plaintiff in relation to said suit has increased, and that many of the inhabitants of said county have formed an opinion of the merits of the above case adverse to the plaintiff, so that plaintiff believes that an unbiased and unprejudiced jury cannot be had in said county for the trial of the above-entitled cause.

Wherefore, in consideration of the premises, the plaintiff prays that a change of venue in the above-entitled cause may be granted to plaintiff according to the statute in such cases made and provided.

19 THE COLORADO SPRINGS COMPANY,

[SEAL.] By HENRY McALLISTER, JR.,
Executive Director.

TERRITORY OF COLORADO,
County of El Paso, ss:

Henry McAllister, j'r, being duly sworn, on his oath states that he is executive director of the Colorado Springs Company, the plaintiff in the foregoing entitled suit, and that he has the control and management of said suit. Deponant further says that the facts stated in the foregoing petition by said plaintiff for a change of venue in said cause are true, except as to those stated to be upon belief, and these deponant believes to be true.

HENRY McALLISTER, J'R.

Subscribed and sworn to this first day of May, A. D. one thousand eight hundred and seventy-four, before me.

[SEAL.] MATT. FRANCE,
Notary Public.

TERRITORY OF COLORADO,
County of El Paso, ss:

Gerald De Coursey, being duly sworn, says that the facts stated in the foregoing petition for change of venue are true, except as to those stated on belief, and those deponent believes to be true.

GERALD DE COURSEY.

Subscribed and sworn to before me this first day of May, A. D.
20 one thousand eight hundred and seventy-four.

[SEAL.] MATT. FRANCE,
Notary Public.

And afterwards, to wit, on the second day of May, A. D. one thousand eight hundred and seventy-four, the same being one of the days of the said April term, A. D. one thousand eight hundred and seventy-four, of said court, the following among other proceedings were had and entered of record, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

This day came the said plaintiff, by its attorney, J. M. Davidson, and upon its petition filed moved the court for a change of venue herein, and the said defendants, by their attorney, George W. Miller, also came, and after argument of counsel, the court being fully advised in the premises, it is considered by the court that said motion be sustained and that the venue in this cause be changed to the county of Pueblo, in the third judicial district of this Territory, and that this cause be transmitted to
the district court of the third judicial district of this Territory,
21 within and for the county of Pueblo, for further proceedings according to law. And the judge of this court made and filed herein his order directing change of venue as aforesaid. And thereupon the said defendants pray an appeal from the above decision of the supreme court of Colorado Territory, which is granted by the court, and it is ordered that the said defendants file within thirty days from this date their bill of exceptions with the clerk of this court.

And the judge of said court made and filed herein his order directing change of venue in said cause upon said day, which said order is in words and figures following:

In the district court of the third judicial district of Colorado Territory, within and for the county of El Paso. April term, A. D. one thousand eight hundred and seventy-four.

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

On this second day of May, A. D. one thousand eight hundred and seventy-four, the same being one of the days of the said April term,
22 A. D. one thousand eight hundred and seventy-four, of said court, came the said plaintiff, by its attorney, J. M. Davidson, and upon its petition filed moved the court for a change of venue herein, and the said defendants, by Geo. W. Miller, their attorney, also came, and after argument of counsel, it is ordered by the court and by the judge thereof

that the venue in this cause be changed to the county of Pueblo, in the third judicial district of Colorado Territory, and that this cause be transmitted to the said district court of the third judicial district of this Territory, within and for the county of Pueblo, for further proceedings according to law.

Witness my hand the day and year first above written.

MOSES HALLETT,
C. J., Judge, &c.

TERRITORY OF COLORADO,
County of El Paso, ss:

I, Geo. A. Bute, clerk of the district court of the third judicial district of Colorado Territory, within and for the county of El Paso, hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record and proceedings had in said court in a certain
23 cause of ejectment between the Colorado Springs Company, plaintiff, and David A. Cowell and John McDowell, defendants; and I further certify that a petition for change of venue and an order directing change of venue have been filed in my office, of each of which a true copy is above set forth. And I further certify that the papers hereunto annexed marked A, B, C, D, E, F, G, H, I, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, 1, 2, 3, 4, are all the papers filed in said cause and forming part of the record therein, excepting the order directing change of venue and the petition for change of venue, of each of which a true copy is above set forth as aforesaid.

Witness my hand and the seal of said court this second day of May, A. D. one thousand eight hundred and seventy-four.

(SEAL OF EL PASO CO. COURT.) GEORGE A. BUTE,
Clerk.

Attached to the above transcript, and marked A, is a certain
24 summons, which, with clerk's filing and sheriff's return thereon endorsed, is in words and figures following:

TERRITORY OF COLORADO,
County of El Paso, ss:

The people of the Territory of Colorado to the Sheriff of El Paso County, greeting:

We command you that you summon David A. Cowell and John McDowell, if they shall be found in your county, personally to be and appear before the district court of said El Paso County on the first day of the next term thereof, to be holden at the court-house in Colorado Springs, in said El Paso County, on the fourth day of November, A. D. one thousand eight hundred and seventy-three, to answer unto Colorado Springs Company in a plea of ejectment to the damage of said plaintiff, as it says, in the sum of five hundred dollars. And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness Geo. A. Bute, clerk of our said court, and the seal
25 thereof, at Col. Springs aforesaid, this twenty-first day of October, A. D. one thousand eight hundred and seventy-three.

[SEAL OF COURT.] GEO. A. BUTE, *Clerk*,
By I. HOWBERT, *Deputy*.

TERRITORY OF COLORADO,
County of El Paso:

October twenty-first, A. D. one thousand eight hundred and seventy-three.

I have duly served the within by reading the same to the within-named David A. Cowell and John McDowell, as I am therein commanded.

ROBERT DONNELLY, *Sheriff*,
By ALDEN BASSETT, *Deputy*.

Filed the twenty-first day of October, A. D. one thousand eight hundred and seventy-three.

GEO. A. BUTE, *Clerk*,
By I. HOWBERT, *Deputy*.

Also attached to the above transcript, marked B, is a certain declaration which, with clerk's filing endorsed thereon, is in words and figures following, to wit:

26 TERRITORY OF COLORADO,
County of El Paso, ss:

In the third judicial district court, sitting in and for the county of El Paso, to the November term, A. D. one thousand eight hundred and seventy-three.

The Colorado Springs Company, a corporation duly created and established under the general laws of the Territory of Colorado, with powers to acquire, hold, and transfer real estate domiciled in the town of Colorado Springs, Territory of Colorado, plaintiff, by J. M. Davidson, its attorney, complains of David A. Cowell and John McDowell, defendants, of a plea wherefore they, the said defendants, with force and arms entered into the following-described premises. For that heretofore, to wit, on the first day of October, A. D. one thousand eight hundred and seventy-three, the said plaintiff was possessed of certain premises situated in the town of Colorado Springs, county of El Paso, and Territory of Colorado, aforesaid, and described as follows, to wit: All that part of lot number one (1), in block number ninety-two (92), town of Colorado Springs aforesaid, commencing at a point at the corner of
27 Pike's Peak avenue and Tejon street, running thence south, along the east side Tejon street, one hundred and five (105) feet; thence east twenty-four feet; thence north one hundred and five (105) feet, and thence west twenty-four feet to the place of beginning; which said premises are now occupied by a certain house known as Johnnie's Billiard Parlor, a bar-room and other appartment, buildings and improvements; and being so possessed thereof the defendants afterwards, to wit, on the sixth (6) day of October, A. D. one thousand eight hundred and seventy-three, entered into such premises, and that they unlawfully withheld from said plaintiff the possession thereof, and the said plaintiff avers that it claims title to the said premises in fee-simple. Wherefore the said plaintiff says it is injured and has sustained damages to a large amount, to wit, the sum of five hundred dollars, and therefore brings this suit.

And also for that, to wit, on the first day of October, A. D. one thousand eight hundred and seventy-three (1873), the said plaintiff
28 was possessed of certain other premises situated in El Paso County aforesaid, in the Territory of Colorado, and described as

follows, to wit: Lot number one (1), in block number ninety-two (92), town of Colorado Springs aforesaid, or so much thereof as is occupied by a certain house known as Johnnie's Billiard Parlor, a bar-room and other appartment, buildings and improvements on said premises; and being so possessed thereof the said defendants afterwards, to wit, on the sixth day of October, A. D. one thousand eight hundred and seventy-three, entered such possession, and that they unlawfully withhold from the plaintiff the possession thereof; and said plaintiff says that it claims title in said premises in fee-simple. Wherefore said plaintiff says it is injured and has sustained damages to a large amount, to wit, the sum of five hundred dollars, and therefore it brings this suit.

By J. M. DAVIDSON, *Att'y, &c.*

Filed October twenty-first, A. D. one thousand eight hundred and seventy-three.

G. A. BUTE, *Clerk*,
By I. HOWBERT, *Deputy*.

29 Also attached to the said transcript, marked "C," is a certain demurrer, which, with clerk's filing endorsed thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of El Paso:

In the honorable district court of the third judicial district, November term, A. D. 1873.

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL & JOHN MCDOWELL.

And the defendants, by Miller, Markham, and Clough, his attorneys, come and defend the wrong and injury, when, &c., and say that the said declaration, and each and every count thereof, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the plaintiff to have and maintain his aforesaid action thereof against the defendants. And for special cause of demurrer assigns the following:

First. The said declaration is not entitled of this court.

Second. There is no time alleged when plaintiff's title accrued.

30 Third. There is no sufficient description of the property claimed.

Wherefore defendants say they are not bound by law to further answer, and this they are ready to verify, wherefore they pray judgment.

By G. W. MILLER,
V. D. MARKHAM, and
H. A. CLOUGH,
Att'ys for Def'ts.

Filed November seventh, A. D. one thousand eight hundred and seventy-three.

GEO. A. BUTE, *Clerk*.

Also attached to the said transcript, marked "D," is a certain joinder in demurrer, which, with clerk's filing endorsed thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of El Paso, ss:

In the third judicial district court of the Territory of Colorado, to the November term, A. D. one thousand eight hundred and seventy-three.

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL.

And the plaintiff says that the declaration is sufficient in law.

By J. M. DAVIDSON.

Filed November eighth, A. D. one thousand eight hundred and seventy-three.

GEORGE A. BUTE, *Clerk.*

31 Also attached to the said transcript, marked "E," is a certain plea, which, with clerk's filing endorsed thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of El Paso:

In the district court of the third judicial district, November term, A. D. one thousand eight hundred and seventy-three.

THE COLORADO SPRINGS COMPANY
vs.
D. A. COWELL AND JOHN MCDOWELL. } In ejectment.

And the defendant, by Miller, Markham, & Clough, his attorneys, come and defend the wrong and injury, when, etc., and say that they are not guilty of unlawfully withholding the said premises claimed by the plaintiff in manner and form as alleged in said declaration, and of this they put themselves upon the country.

By G. W. MILLER,
V. D. MARKHAM, &
H. A. CLOUGH,
Att'ys for Def'ts.

Filed November tenth, A. D. one thousand eight hundred and seventy-three.

GEORGE A. BUTE, *Clerk.*

32 Also attached to the said transcript, marked "F," is a certain joinder in issue, which, with clerk's filing endorsed thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
El Paso County, ss:

In the third district court of the third judicial district, sitting in and for the county of El Paso, to the November term, A. D. one thousand eight hundred and seventy-three.

THE COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL & JOHN MCDOWELL. } Ejectment.

And the plaintiff, by its attorney, J. M. Davidson, as to the plea of

the said defendants herein pleaded, and whereof they have put themselves upon the country, doth the like.

J. M. DAVIDSON,
Att'y for Plaintiff.

Filed November tenth, A. D. 1873.

GEORGE A. BUTE, *Clerk.*

And afterwards, to wit, on the seventeenth day of June, A. D. one thousand eight hundred and seventy-four, the same being one of
33 the days of the said June term, A. D. 1874, of the said Pueblo County district court, the following among other proceedings were had and entered of record, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

This day came the said plaintiff, by its attorneys, J. M. Davidson and H. C. Thatcher, and the said defendants, by their attorneys, Geo. W. Miller & Jno. W. Henry, also came, and this cause came on for trial. Then came a jury, twelve good and lawful men, to wit, H. S. Seward, Garrett Langford, John Medill, Norbert Porguin, Albert B. Chase, A. C. Barnum, W. A. Wiggins, Steven M. Waggoner, John Williams, Seth McCausland, John J. Thomas, J. T. Collier, who being duly empaneled and sworn to well and truly try the issue joined in this cause and a true verdict render according to the evidence, heard part of the evidence of witnesses.

34 And afterwards, to wit, on the eighteenth day of June, A. D. one thousand eight hundred and seventy-four, the same being one of the days of the said June term, A. D. 1874, of said court, the following, among other proceedings, were had and entered of record, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL & JOHN MCDOWELL. } Ejectment.

This day came again the said parties, by their respective attorneys, and the jurors heretofore and on yesterday sworn and empaneled in this cause also came again, to wit, H. S. Seward, Garrett Langford, John Medil, Norbert Porquin, Albert B. Chase, A. C. Barnum, W. A. Wiggins, Steven M. Waggoner, John Williams, Seth McCausland, John J. Thomas, J. T. Collier, who, after hearing all the evidence of witnesses and the arguments of counsel and the instructions of the court, retired to their room in charge of a sworn bailiff.

35 Afterwards, and upon the same day, the jurors aforesaid returned into court their verdict in the cause, as follows: "We, the jury, find defendant guilty, and that the plaintiff is the owner in fee of the premises described in the declaration."

And afterwards, to wit, on the nineteenth day of June, A. D. one thousand eight hundred and seventy-four, said day being one of the days of the June term, A. D. 1874, of said court, the following among other proceedings were had and entered of record, to wit:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

This day came the said parties, by their respective attorneys, and the said defendants now here move the court for a new trial herein, and after argument of counsel, the court being fully advised in the
36 premises, it is considered by the court that said motion be denied, and thereupon the said defendants move the court to arrest the judgment herein, and after argument of counsel, the court being fully advised in the premises, it is considered by the court that said motion be denied, and thereupon it is considered by the court that the said plaintiff do recover against the said defendants the possession of the premises, according to the verdict of the jury heretofore rendered herein as described in the declaration herein, to wit: All the part of lot number one (1), in block number ninety-two (92), in the town of Colorado Springs, in the county of El Paso, and Territory of Colorado, commencing at a point at the corner of Pike's Peak avenue and Tejon street, running thence south along the east side of Tejon street one hundred and five (105) feet, thence east twenty-five feet, thence north one hundred and five (105) feet, and thence west twenty-five feet to the place of beginning; and that it have a writ of possession therefor, according to the force,
37 form, and effect of said recovery. And it is further considered that the said plaintiff do have and recover of and from the said defendants its costs and charges by it about its suit in this behalf expended, to be taxed, and that execution issue therefor.

And thereupon the said defendants pray an appeal from the judgment aforesaid to the supreme court of the Territory of Colorado, which is granted by the court. And it is ordered by the court that the said defendants, within sixty days from this date, file with the clerk of this court their appeal bond, in the sum of five hundred dollars, with security to be approved by said clerk, and that they file their bill of exceptions herein by October fifteenth, A. D. one thousand eight hundred and seventy-four.

And afterwards, to wit, on the twenty-first day of July, A. D. one thousand eight hundred and seventy-four, the defendant David A. Cowell, by his attorney, Geo. W. Miller, filed in said clerk's office a
33 bond, which, with the clerk's approval endorsed thereon, is in certain words and figures following, to wit:

Know all men by these presents that we, David A. Cowell and J. S. Reef & H. E. Freeman are held and firmly bound unto the Colorado Springs Company in the just and full sum of five hundred dollars, in the payment of which said sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Witness our hands and seals this 15th day of July, A. D. 1874.

The condition of the above obligation is as follows: That whereas the said Colorado Springs Company begun a suit in ejectment against the said David A. Cowell and John McDowell, in the district court of El Paso County, and the same was taken on change of venue to the district court of Pueblo County, and at the June term of said district court of Pueblo County a judgment was rendered in favor of said Colorado Springs Company, and against the said David A. Cowell: Now,
39 if the said David A. Cowell shall well and truly pay the judgment, costs, interest and damages in case said judgment of the

district court shall be affirmed, and shall also prosecute his appeal from said judgment, then this obligation to be null and void; otherwise to be and remain in full force and effect.

(Signed) D. A. COWELL. [SEAL.]
J. S. REEF. [SEAL.]
H. E. FREEMAN. [SEAL.]

Filed and approved July 21, A. D. 1874.

GEORGE A. BUTE,
Clerk.

And afterwards, to wit, on the fourteenth day of September, A. D. one thousand eight hundred and seventy-four, the said parties, by their respective attorneys, filed in the said clerk's office certain stipulations, which are in words and figures following:

TERRITORY OF COLORADO,
County of Pueblo, ss:

District court, 3d judicial district.

THE COLORADO SPRINGS COMPANY
vs.
40 DAVID A. COWELL ET AL. } Ejectment.

It is hereby agreed and stipulated by and between the parties in the above-entitled suit that the time for presenting and filing a bill of exceptions in the above-entitled cause is hereby extended to the 15th day of October, 1874, & that this paper be filed in the same.

DAVIDSON & HARRISON,
Att'ys for Pl'ffs.
GEORGE W. MILLER,
Att'ys for Defendant.

And afterwards, to wit, on the fifteenth day of October, A. D. one thousand eight hundred and seventy-four, there was filed a certain bill of exceptions, which is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Pueblo:

In the district court of the third judicial district of Colorado Territory, sitting in and for the county of Pueblo aforesaid, of the June term, A. D. one thousand eight hundred and seventy-four.

41 THE COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Bill of exceptions.

Be it remembered that on the trial of this cause, at the June term, A. D. 1874, of the said district court, the plaintiff, to maintain the issue on its part, offered in the evidence a certified copy of its incorporation, which said copy, with the certificate thereunto attached, were in the words and figures following:

This is to certify that we, the undersigned, desire to form a company and become a body corporate under and by virtue of the provisions of

chapter eighteen of the revised statute' of the Territory of Colorado, and of the acts amendatory thereto, for the purpose of aiding, encouraging, and inviting immigration to said Territory, and to purchase, acquire, hold, possess, sell, convey, and dispose of lands, town-lots, mineral springs, and other property in said Territory; also to build, construct,
42 and operate ditches, wagon-roads, and railroads; also to build and operate mills for manufacturing lumber and other articles of wood, and generally to do all such things as are authorized by the acts aforesaid, which may tend to accomplish the purpose above stated.

1st. The corporate name of the said company shall be the Colorado Springs Company.

2nd. The objects for which the said company shall be formed in connection with the purpose aforesaid are the purchase of lands and mineral springs in El Paso County and elsewhere in the said Territory, and the establishment and building up of colonies, towns, and watering-places in said county, and elsewhere in said Territory, and in accomplishing these objects to purchase, acquire, hold, possess, sell, convey, and dispose of lands, town-lots, mineral springs, and other property, to prepare for sale and transport and sell the water of said springs, and to erect hotels, baths, and make other improvements in connection therewith, and lease, sell, or otherwise dispose of the same, build ditches, wagon roads, and railroads, mills, and other manufacturing establishments, and work and operate, or sell, or lease the same, and es-
43 pecially to construct a dam and ditch for the purpose of conveying water to be used for manufacturing purposes, and for irrigating the lands in and near the town of Colorado Springs, in said county of El Paso, which dam is to be built upon and which ditch to be taken out of Monument Creek at such points thereon in section nineteen (19), township thirteen (13), range sixty-six (66), as shall be considered by said company most suitable for making a dam to raise the water of said creek sufficiently high to supply the ditch with water for the purposes aforesaid. And the line of said ditch to run from said dam in a southeasterly directions, along the proper grades, not exceeding eight feet per mile, to such point on the lands of the company aforesaid as will best cover the purpose thereof, and generally to do all such things as are authorized by the acts aforesaid which may tend to accomplish the said purpose.

3d. The capital stock of the said company shall be three (?) thousand dollars, to be divided into three thousand shares of one hundred dollars each.

44 4th. The term of the corporate existence of said company shall be thirty years from the filing of this certificate.

5th. The number of trustees of said company who shall manage the concerns of said company for the first year, shall be six, viz, William P. Mellen, Robert A. Cameron, Robert H. Lamborn, William H. Greenwood, William J. Palmer, and Josiah C. Reiff.

6th. The principal office of said company shall be in the town of Colorado Springs, in the county of El Paso, and its operations shall be carried on there, and in such other towns and counties as shall be hereafter lawfully designated.

7th. The trustees shall have power to make such by-laws as they may deem proper for the management and disposition of the stocks and affairs of the said company.

In witness whereof we have hereunto set our hands and seals the twentieth day of June, A. D. 1871.

WILLIAM J. PALMER. [SEAL.]
WILLIAM P. MELLEN. [SEAL.]
R. A. CAMERON. [SEAL.]
ROBERT H. LAMBORN. [SEAL.]
WILLIAM H. GREENWOOD. [SEAL.]
JOSIAH C. REIFF. [SEAL.]

45 TERRITORY OF COLORADO,
County of Weld:

On the twentieth day of June, A. D. 1871, before me personally came William J. Palmer, William P. Mellen, R. A. Cameron, Rob't H. Lamborn, and Josiah C. Reiff, to me known to be the individuals described in and who executed the foregoing instrument, and acknowledged that they executed the same for the purposes herein mentioned.

WILLIAM E. PABOR,
Notary Public in and for Weld County, Colorado.

TERRITORY OF COLORADO,
County of El Paso:

I, Irving Howbert, county clerk and recorder in and for said county, do hereby certify that the above is a true and correct copy of the record of the certificate of incorporation of the Colorado Springs Company now on file in my office; that the said certificate was filed for record at 7 o'clock a. m. June 29, 1871, and that such certificate was duly recorded in book C, page 280.

46 In witness whereof I have hereunto set my hand and affixed my official seal the 9th day of June, A. D. 1873.

IRVING HOWBERT,
County Clerk and Recorder,
Per WILLIAM CHASE,
Deputy.

And the same was given in evidence to the jury.

And the plaintiff, to further maintain the issue on its part, offered in evidence an act to incorporate the National Land and Improvement Company.

SECTION 1. Be it enacted by the senate and house of representatives of the commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, that James B. Ferrie, E. B. Harper, A. W. Arnold, George N. Eddy, Stephen Cox, R. P. Fitts, R. P. King, A. B. Keith, H. R. Warriner, A. M. Spangler, Harrison Grambo, A. T. Johnson, and J. A. Graham, and their associates and successors, be, and they are hereby, created a body politic and corporate by the name, style, and title of the National Land and Improve-
47 ment Company, and by that name and title shall have perpetual succession, and may sue and be sued, plead and be impleaded in all courts of record and elsewhere, and be capable of receiving, holding, and granting in its corporate name property, real, personal, and mixed, and of exploring, locating, and improving lands, and transporting emigrants and merchandise and constructing houses and buildings, manufacturing, trading, trafficking, colonizing, organizing, and forming settlements, and operating mineral and other lands, and improving and work-

ing the same; provided such lands shall be located in Utah, Arizona, or adjoining States and Territories lying west of the Mississippi River, and doing such acts and things as shall be necessary to promote the success of the corporation and be for the general public good.

SECTION 2. That the said corporation shall have power to make such by-laws as they may deem necessary to enable them to carry out
48 the object of the corporation and for the government of the same, and the same to alter, amend, add to, or repeal, at their pleasure, and to adopt a common seal and to alter the same; provided that the said by-laws shall not be contrary to the constitution and laws of the commonwealth of Pennsylvania and the United States.

SECTION 3. That the capital stock of the corporation shall be divided into five hundred thousand shares, to be assessed as its necessities shall require to carry out the purpose thereof, but the par value of the shares shall be fixed by the by-laws, and its affairs shall be managed by a board of not less than seven nor more than fifteen of its stockholders, to be elected annually at such time and place as the by-laws shall direct, but they shall hold office until their successors shall be elected.

SECTION 4. That the corporation shall have power to create, mortgage, and issue bonds in sums of not less than one hundred dollars each, with coupons payable semi-annually, at a rate of interest not ex-
49 ceeding seven and three-tenth per centum per annum, and for terms not exceeding twenty years from their date.

SECTION 5. That the corporation may establish offices and carry on its business at such places as the directors may deem for the best interest of the public, but the principal office shall be located in Philadelphia.

JAMES B. KELLOGG,
Speaker of the House of Rep's.
DANIEL FLEMING,
Speaker of the Senate.

Approved the seventeenth day of April, anno Domini one thousand eight hundred and sixty-six.

A. G. CURTIN.

An act repealing the proviso of the first section of an act entitled "An act to incorporate the National Land and Improvement Company," approved the seventeenth day of April, anno Domini one thousand eight hundred and sixty-six.

SECTION 1. Be it enacted by the senate and house of representatives of the commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That the proviso of the first section of an act entitled "An act to incorporate the National Land and Improvement Company," approved the seventeenth day
50 of April, anno Domini one thousand eight hundred and sixty-six, be, and the same is hereby, repealed; provided, that the said corporation shall not operate within the limits of this commonwealth.

JOHN CLARK,
Speaker of the House of Representatives.
WILMER WORTHINGTON,
Speaker of the Senate.

Approved the seventeenth day of April, anno Domini one thousand eight hundred and sixty-nine.

JNO. W. GEARY.

OFFICE OF THE SECRETARY OF THE COMMONWEALTH,
Harrisburg, April seventeenth, A. D. 1873.

PENNSYLVANIA, *ss:*

I do hereby certify that the foregoing and annexed is a full, true, and correct copy of the original acts of the general assembly, entitled "An act to incorporate the National Land and Improvement Company," and an act repealing the proviso of the first section of an act entitled "An act to incorporate the National Land and Improvement Company," approved the seventeenth day of April, anno Domini one thousand eight hundred and sixty-six, as the same remain on file in this office.

51 In testimony whereof I have hereunto set my hand and caused the seal of the secretary's office to be affixed the day and year above written.

JOHN B. LINN,
Deputy Secretary of the Commonwealth.

In the name and by the authority of the commonwealth of Pennsylvania, John F. Hartranft, governor of the said commonwealth, to all to whom these presents shall come sends greeting:

Know ye that the attestation or certificate hereunto attached is in due form and made by the proper officer, and that John B. Linn, whose name is subscribed thereto, was at the time of subscribing the same and now is deputy secretary of the commonwealth, duly appointed and commissioned, and full faith and credit are due and ought to be given to his official acts accordingly.

Given under my hand and the great seal of the State, at Harrisburg, the seventeenth day of April, in the year of our Lord one thousand
52 eight hundred and seventy-three, and of the commonwealth the ninety-seventh.

J. F. HARTRANFT,
Governor.

By the governor:
[SEAL.] M. S. QUAY,
Secretary of the Commonwealth.

And the plaintiff, to further maintain the issue on its part, offered in evidence a patent from the United States to Charles B. Lamborn, trustee, which said patent was in words and figures following, to wit:

Certificate No. 1303.

The United States of America to all to whom these presents shall come, greeting:

Whereas Charles B. Lamborn, trustee, of S't Louis County, Missouri, has deposited in the General Land Office of the United States a certificate of the register of the land office at Denver City, Colorado Territory, whereby it appears that full payment has been made by the said Charles B. Lamborn, trustee, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the east half of the south-
53 east quarter of section seven, the northwest quarter of section eight, and the east half of the northeast quarter, the south half of the northwest quarter, and the north half of the southwest quarter of

section eighteen, in township fourteen south, of range sixty-six west, in the district of lands subject to sale at Denver City, Colorado Territory, containing four hundred and seventy-six acres and fifty-eight hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor general, which said tracts have been purchased by the said Charles B. Lamborn, trustee:

Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Charles B. Lamborn, trustee,

and to his heirs, the said tract above described, to have and to
54 hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Charles B. Lamborn, trustee, and to his heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twentieth day of September, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fifth.

U. S. GRANT.

By the President:

[SEAL.] By S. A. FISKE,
Assist. Sec.

M. GRANGER,
Recorder of the General Land Office.

To the giving of which said patent in evidence defendants, by their counsel, then and there objected because there was no public act of the United States Congress as is referred to in said patent, and because the same was immaterial to the issue, and the objections were over-
55 ruled by the court and the patent admitted in evidence; to which opinion and decision of the court in overruling said objections and admitting said patent in evidence defendants, by their counsel, then and there excepted.

[$26.00 revenue stamp cancelled.]

This deed made this thirteenth day of March, in the year of our Lord one thousand eight hundred and seventy-two, between Charles B. Lamborn, trustee, of the county of Jackson and State of Missouri, of the first part, and the National Land Improvement Company of the county of El Paso and Territory of Colorado, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of sixteen thousand dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey and confirm

unto the said party of the second part, its successors and assigns
56 forever, all the following-described lots or parcels of land situated, lying and being in the county of El Paso and Territory of Colorado, to wit:

One equal undivided half part of the west half of northeast quarter, the east half of northwest quarter, the west half of southeast quarter, and the southeast quarter of section twenty-eight, the southeast quarter of section twenty-nine (29), the south half of section thirty-

one, the south half and the northeast quarter of section thirty-two (32), and the west half of section thirty-three (33), all in township thirteen (13) south, of range sixty-six west, of the sixth principal meridian. Also, all of section five (5), the east half of the east half of southwest quarter and the northwest quarter of section six (6), the east half, the east half of northwest quarter, and the east half of southwest quarter of section seven (7); all of section eight (8); all of section seventeen (17); the east half, the east half and southwest quar-
57 ter of northwest quarter, and the southwest quarter of section eighteen (18); the north half of northeast quarter and the north half of northwest quarter of section nineteen (19); the north half, the east half, and the northwest quarter of southeast quarter, and the southwest quarter of section (20), and the north half of northwest quarter of section (29), all in township fourteen (14) south, of range sixty-six (66) west, of sixth principal meridian, containing, according to United States survey, six thousand and twelve $\frac{27}{100}$ (6,012$\frac{27}{100}$) acres, be the same more or less, excepting and reserving out of the above-described lands the grounds for track, yard room, depot, and other buildings for the Denver and Rio Grande Railway Company, described as follows: Commencing at a point in the center of the railway one hundred and fifty-two (152) feet northerly from where the north line of Pike Peak's avenue, as shown in the town plat of Colorado Springs, crosses the railroad; thence running easterly parallel with said avenue one hundred and fifty (150)
58 feet; thence southerly and parallel with the railway to the south line of Cuchara street; thence easterly in the south line of said street forty feet to a point one thousand (1,000) feet westerly from the west line of Cascade avenue; thence southerly in a line parallel with Cascade avenue, one thousand four hundred and fifty (1,450) feet to the north line of Cimarron street; thence westerly in the north line of Cimarron street about five hundred and fifty (550) feet to the section line on the west side of section eighteen (18) in township fourteen (14) south, of range sixty-six (66) west; thence north fourteen hundred and fifty (1,450) feet to the south line of Cuchara street; thence easterly in the south line of Cuchara street to a point fifty (50) feet west of center of said railway track as it is now built; thence northerly in a line parallel with the railway to a point one hundred and fifty-two (152) feet northerly from the north line of Pike's Peak avenue; thence easterly fifty feet to place of beginning; conveyed to the said Denver and Rio Grande Railway
59 Company by deed dated March twelfth, eighteen hundred and seventy-two, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise pertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the hereditaments and appurtenances: To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, its successors and assigns forever. And the said Charles B. Lamborn, trustee, party of the first part, for himself, his heirs, executors and administrators, doth covenant, grant, bargain, and agree to and with the said party of the second part, its successors and assigns, that at the time of the ensealing and delivery of these presents he has good right, full power and lawful authority to grant, bargain, sell, and
60 convey the said premises in manner and form aforesaid, and the above bargained premises in the quiet and peaceable possession of the said party of the second part, its successors and assigns, against all

and every person or persons lawfully claiming or to claim the whole or any part thereof from or through the said party of the first part, the said party of the first part shall and will warrant and forever defend.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

CHARLES B. LAMBORN, *Trustee.* [SEAL.]

Signed, sealed and delivered in the presence of—in 4 line from bottom of first page, word "East" erased, and word "West" inserted previous to signature, correcting description of tracts to "West half of section thirty-three (33)"—

A. H. CALEF.
M. A. L. WOODS.

STATE OF MISSOURI,
County of S't Louis:

Be it remembered that on the sixth day of May, A. D. 1872, before me the undersigned, a commissioner of deeds for the Territory of Colorado, duly commissioned by the executive authority and under the laws of said Territory to take the acknowledgements of deeds, &c., personal'y appeared Charles B. Lamborn, trustee, to me personally
61 known to be the identical person named in and who executed the foregoing instrument of writing, and he in due form of law acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act and deed as trustee, for the uses and purposes therein set forth. In witness whereof I have hereunto set my hand and affixed my official seal, at S't Louis, the day and year aforesaid.

A. H. CALEF,
Commissioner for Colorado.

To the giving of which said deed in evidence defendants, by their counsel, then and there objected because said deed was immaterial to the issue, and because the same was not properly executed, and because the same was not acknowledged by the grantor therein, in conformity to the laws of Colorado Territory, and also generally objected to, which said objections were overruled by the court; to which opinion and decision of the court, in overruling said objections, defendants by their counsel then and there excepted.

62 And the plaintiff, to further maintain the issue on its part, offered in evidence certified copy of deed from National Land and Improvement Company to Colorado Springs Company, which said copy with the certificate thereunto attached are in the words and figures following:

This deed, made the fourteenth day of March, in the year of our Lord one thousand eight hundred and seventy-two, between the National Land and Improvement Company, of the county of El Paso and Territory of Colorado, of the first part, and the Colorado Springs Company, of the same county and Territory, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of thirty thousand dollars, to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, convey, and confirm unto the said party of the second part, its successors and assigns for-

ever, all the following described lots or parcels of land situate,
63 lying, and being in the county of El Paso and Territory of Colorado, to wit: The southwest quarter of sec. 4, and the S. ½ and the N. W. ¼ of sec. 5, in township 14 S., of R. 67 W., containing about 640 acres, and including all mineral springs thereon; also the N. E. ¼ of N. W. ¼, and the N. W. ¼ of N. E. ¼, and the S. ½ of the S. E. ¼, and the E. ½ of the N. E. ¼, and the N. W. ¼ of the S. E. ¼, and the S. W. ¼ of the N. E. ¼, and the S. E. ¼ of the N. W. ¼, and the N. W. ¼ of the N. W. ¼ of sec. 12, and the S. E. ¼ and the E. ½ of the S. W. ¼ of sec. 1, and the N. E. ¼ of the N. E. ¼ of sec. 11, in township 14 S., of R. 67 W., containing about 680 acres; also the W. ½ of the S. W. ¼ of sec. 6, and the W. ½ of the S. W. ¼ and the W. ½ of the N. W. ¼ of sec. 7, and the S. ½ of the N. W. ¼ and the S. W. ¼ of the N. E. ¼, and all that portion of the N. W. ¼ of the S. E. ¼, lying north of the "Fountain qui boille," of sec. 19, in township 14 S., of R. 66 W., containing about 380 acres; also the S. ½ of the N. E. ¼ of sec. 20, and the S. W. ¼ of the N. W. ¼ and the S. W. ¼ of the S. E. ¼ of sec. 21, and the west ½ of the S.
64 W. ¼ of sec. 22, and the N. W. ¼ of the N. W. ¼ and the S. W. ¼ of the S. W. ¼ of sec. 27, and the W. ½ of the N. W. ¼ and the N. E. ¼ of the N. E. ¼ and the S. E. ¼ of the S. E. ¼ of sec. 28, and the N. E. ¼ of sec. 29, and the E. ½ of sec. 33, and the W. ½ and S. E. ¼ and the S. W. ¼ of N. E. ¼ of section 34, in township 13 S., of R. 66 W., containing about 1,760 acres; also one equal undivided half of the W. ½ of the N. E. ¼ and the E. ½ of N. W. ¼ and the W. ½ of the S. E. ¼ and the S. W. ¼ of sec. 28, and the S. E. ¼ of sec. 29, and the S. ½ of sec. 31, and the S. ½ and the N. E. ¼ of sec. 32, and the W. ½ of sec. 33, all in township thirteen S., of R. 66 W.; also all of sec. 5, and the E. ½ and the E. ½ of the S. W. ¼ and the N. W. ¼ of sec. 6, and the E. ½ and the E. ½ of the N. W. ¼ and the E. ½ of the S. W. ¼ of sec. 7, and all of sec. 8, and all of sec. 17, and the E. ½ and the E. ½ and S. W. ¼ of the N. W. ¼ and the S. W. ¼ of sec 18, and the N. ½ of the N. E. ¼ and the N. ½ of the N. W. ¼ of sec. 19, and the N. ½ and the E. ½ and the N. W. ¼ of the S. E. ¼ and the S. W. ¼ of sec. 20, and the N. ½ of the
65 N. W. ¼ of sec. 29, all in township 14 S., of R. 66 W, containing, according to United State' surveys, six thousand and twelve $\frac{27}{100}$ (6,012$\frac{27}{100}$) acres, be the same or less, excepting and reserving out of the above described lands the ground for track, yard room, depot, and other buildings, for the Denver and Rio Grande Railway Company, described as follows: Commencing at a point in the center of the railway one hundred and fifty-two feet northerly from where the north line of Pikes Peak avenue, as shown in the town-plat of Colorado Springs, crosses the railroad; thence running easterly, parallel with said avenue, one hundred and fifty (150) feet; thence southerly and parallel with the railway to the south line of Cuchara street; thence easterly in the south line of said street forty feet, to a point one thousand feet westerly from the west line of Cascade avenue; thence southerly in a line parallel with Cascade avenue one thousand four hundred and fifty feet, to the north line of Cimarron street; thence westerly in the north line of Cimarron street about five hundred and fifty feet
66 to the section line on the west side of section eighteen in township fourteen (14) S., range 66 west, thence north fourteen hundred and fifty (1,450) feet to the south line of Cuchara street, thence easterly in the south line of Cuchara street to a point fifty (50) feet west of the center of said railway track as it is now built, thence northerly in a line parallel with the railway to a point one hundred and fifty-two feet northerly from the north line of Pike's Peak avenue, thence east-

erly fifty feet to place of beginning—conveyed to the said Denver and Rio Grande Railway Company by deed of Charles B. Lamborn, trustee, dated March 12, A. D. 1872—together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or equity of, in, and to, the above bargained premises, with
67 the hereditaments and appurtenances; to have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, its successors and assigns forever, and the said National Land and Improvement Company, party of the first part, for itself, its successors and assigns doth covenant, grant, bargain and agree to and with the said party of the second part, its successors and assigns, that at the time of the ensealing and delivery of these presents it is well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeasable estate of inheritance in law in fee simple, and hath good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of whatever kind and nature soever, and the above bargained premises in the quiet and peaceable possession of the
68 said party of the second part, its successors and assigns against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

In witness whereof the said party of the first part has hereunto affixed its coporate seal and caused the same to be attested by the signature of its president and secretary in pursuance of a resolution of its board of directors, the day and year above written.

ROBERT H. LAMBORN, [SEAL.]
Pres't N. L. & I. Co. [SEAL.]
M. L. DE COURSEY, [SEAL.]
Secretary.

Signed, sealed and delivered in presence of—
ALFRED C. FERRIS.
E. ROBERTS COX.

STATE OF PENNSYLVANIA,
City and County of Philadelphia:

Be it remembered, that on this third day of June, anno Domini, one thousand eight hundred and seventy-two, before me, the undersigned, a commissioner for the Territory of Colorado, duly commissioned and qualified by the executive authority and under the laws of the
69 said Territory to take the acknowledgement of deeds, &c., personally appeared Robert H. Lamborn, president, and M. L. De Coursey, secretary of the National Land and Improvement Company, to me personally known to be the identical persons named in and who executed the annexed instrument, and they in due form of law severally acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act and deed for the uses and purposes herein set forth.

In witness whereof I have hereunto set my hand and affixed my official seal at the city of Philadelphia, the day and year aforesaid.

[SEAL.] CHA'S I. HINCHMAN,
Commissioner of Deeds, &c., for Colorado.

TERRITORY OF COLORADO,
County of El Paso:

I, Irving Howbert, clerk and recorder of said county and Ter-
70 ritory, do hereby certify that the instrument of writing hereto attached is a true copy of the original as appears from the records of my office. Witness my hand & official seal this tenth day of November, A. D. 1873.

[SEAL.] IRVING HOWBERT,
Clerk and Recorder.

To the giving of which said certified copy of said deed in evidence defendants by their counsel then and there objected, because said deed showed no title, and because there is no evidence that such company had any existence or had a right to make the conveyance, and because the same was not acknowledged as required by the laws of Colorado Territory, which objections were overruled by the court, and said certified copy admitted in evidence, to which opinion and decision of the court in overruling said objections and admitting said certified copy of said deed in evidence defendants by their counsel then and there excepted.

And the plaintiff, to further maintain the issue on its part,
71 offered in evidence a certified copy of a deed from the Colorado Springs Company to David A. Cowell, one of the defendants, which said certified copy was in the words and figures following:

This indenture, made this twentieth day of May, in the year of our Lord one thousand and eight hundred and seventy-three, between the Colorado Springs Company, a corporation duly created under the laws of the Territory of Colorado, party of the first part, and D. A. Cowell, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of two hundred and fifty dollars to it in hand paid by the said party of the second part, and also for the further consideration of the agreement between the parties hereto, for themselves, their heirs, successors, and legal representatives, that intoxicating liquors shall never be manufactured, sold, or otherwise disposed of, as a beverage, in any place of public resort in or
72 upon the premises hereby granted, or any part thereof; and it is herein and hereby expressly reserved by the said party of the first part that in case any of the above conditions concerning intoxicating liquors are broken by the said party of the second part, his assigns or legal representatives, then this deed shall become null and void, and all right, title, and interest of, in, and to the premises hereby conveyed shall revert to the said party of the first part, its successors and assigns; and the said party of the second part, by accepting this deed for himself, his heirs, executors, administrators, and assigns, consents and agrees to the reservations and conditions aforesaid; and also in further consideration that the said party of the second part shall never present or prosecute any claims for damages done by any irrigating canal which passes through or may pass through the land described in this conveyance against the said party of the first part, has granted, bargained, and sold, and by these presents does grant, bargain, sell, and convey unto the said party of the second part, his heirs and
73 assigns, the following described lands and premises in the town of Colorado Springs, county of El Paso, and Territory of Colorado, viz: Lot number one (1) in block number ninety-two (92), and lot number twenty-one (21) in block number eighty-three (83).

Also, the said party of the first part, by these presents, does grant,

bargain, sell, and convey unto said party of the second part, the right to water from the irrigating canals of the said party of the first part for the purpose of irrigating the lands and premises hereinbefore described, and for household uses, subject to such rules and regulations as may be prescribed by the said party of the first part, and also subject to all assessments for the necessary enlargements and repairs and the necessary expense of superintendence of the canals from which water is received by the said party of the second part:

To have and to hold the same, with all the privileges and appurtenances, and all the estate, right, title and interest of the said party
74 of the first part, either in law or equity, to the only proper use and benefit of the said party of the second part, his heirs and assigns forever; subject nevertheless to the conditions and reservations hereinabove named and set forth, according to the true intent and meaning thereof; and the said party of the first part further covenants with the said party of the second part, that at the time of the ensealing and delivery of these presents it is well seized of the premises above conveyed as of good, sure, perfect, absolute and indefeasible estate of inheritance in law in fee-simple, and has good right, full power, and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of whatever kind and nature soever; and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person lawfully
75 claiming or to claim the whole or any part thereof, the said party of the first shall and will warrant and forever defend.

In witness whereof, the said party of the first part hath hereunto affixed the corporate seal, and caused the same to be attested by the signatures of its president and secretary, the day and year first above written.

W'M J. PALMER,
President.

Attest:
[SEAL.] M. L. DE COURSEY, *Ass't Secretary.*

TERRITORY OF COLORADO,
County of El Paso:

Be it remembered, that on this 20th day of May, A. D. 1873, before me, the undersigned, a notary public in and for said county, in the Territory aforesaid, duly commissioned and qualified under the laws of said Territory to take the acknowledgement of deeds, &c., personally appeared William J. Palmer, president of the Colorado Springs
76 Company, and M. L. De Coursey, assistant secretary of said company, to me personally known to be the identical persons named in and who executed the within and foregoing deed, and they in due form of law severally acknowledge that they signed, sealed, and delivered the said instrument as their free and voluntary act and deed for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and fixed my official seal, at Colorado Springs, the day and year aforesaid.

[SEAL.] MATT FRANCE,
Notary Public.

TERRITORY OF COLORADO,
County of El Paso:

I, Irving Howbert, clerk and recorder in and for said county, do hereby certify that the above and foregoing is a true and correct copy a deed from the Colorado Springs Company to D. A. Cowell, as recorded on page 309 of book E of said El Paso County records, on the 24th day of May, A. D. 1873.

77 Given under my hand and official seal this fifth day of June, A. D. 1874.

IRVING HOWBERT,
Clerk & Recorder.

To the giving of which said certified copy of said deed in evidence defendants by their counsel then and there objected, because the same was immaterial to the issue and that the condition should not be given in evidence; and the objections were overruled by the court and the said deed admitted in evidence, to which decision of the court in overruling said objections and admitting said copy of said deed in evidence defendants by their counsel then and there excepted.

And the plaintiff, to further maintain the issue on its part, called as a witness on its behalf E. S. Nettleton, who, being duly sworn, testified as follows:

I reside in Colorado Springs. Have resided there three years.
78 Am civil engineer. Was employed eighteen months, from June twenty-six, eighteen hundred and seventy-one, to October, eighteen hundred and seventy-two. The town was laid out in July and August, eighteen hundred and seventy-one. I laid it out. I was their engineer. It is located in section sixteen, in township nineteen. The premises, lot numer one, in block number ninety-two, is located on the southeast corner of Pike's Peak avenue and Tejon streets, in the town of Colorado Springs, El Paso County, Colorado Territory. I suppose M'r Cowell occupies it now. I should judge he has occupied it a year or more. I partially know for what purpose. Johnny's billiard parlor was the last on the premises. As agent of Colorado Springs Company two years ago, after survey, I made plats in which this lot is designated. I made marks and drove stakes during survey by authority of the Colorado Springs Company. I am not certain, but think the original size of lot one, in block ninety-two, was
79 twenty-three or twenty-five feet front by one hundred and five feet, does not include all that lot. I was on the lot as agent of the Colorado Springs Company more than once. The Colorado Springs Company had an office in the limits of plat; an office for transacting business. General Palmer, at the time, was president; General Cameron, vice-president and superintendent; and W. E. Pabor, secretary. R. A. Cameron transacted business and was superintendent from June twenty-sixth until October twenty-sixth, eighteen hundred and seventy-two. He was manager of affairs of the company; had the direction of the laying out of the town. I received directions from him. The town was laid out, ditches made, hotels built, and property exchanged. Section eighteen, in the deed from Charles Lamborn, trustee, to National Land and Improvement Company, covers the lot in dispute; and also the deed from National Land and Improvement Company to the Colorado Springs Company, and also the patent from the United States to Charles B. Lamborn, trustee. Section eighteen (18), in township
80 fourteen (14), forms a part of the ground on which the town of

Colorado Springs is located, within the limits of the town, as platted by me. The property, lot one, in block ninety-two, is located in northwest quarter of section eighteen, in township fourteen south, of range sixty-six west; it is located in the south half of quarter-section of northwest quarter of township fourteen south, range sixty six west.

Cross-examination:

The Colorado Springs Company was not in possession in the year 1871. I do not know who was selling lots in the year 1871. The springs was not, I think. No certificates were issued. General Cameron, superintendent, was locating and selling. He was one of the trustees of the springs company. There were no certificates issued in 1871. There were certificates issued by William E. Pabor, as secretary of Colorado Springs Company and Fountain Colony, in whose name one location was indorsed as Fountain Colony. In April and May, 1872, William E. Pabor issued certificates. He was the secretary of the company;

Have seen him sign as secretary of Colorado Springs in 1872;
81 signing certificates of stock. The Colorado Springs Company employed me. I think I had a notice to that effect. General Cameron gave me notice on the 26th of June, 1871. Sometimes M'r Pabor, between June 26 and April & May following, selected lots. I do not know the time the Colorado Springs Company bought this. The Colorado Springs Company or Fountain Colony employed Pabor. The Fountain Colony was in possession from 1871 to 1872. They were not issued by Fountain Colony. Lots were located up to May, 1872. M'r Pabor did not receive that money. Whether M'r Pabor did receive money, he did not receive it in that time. I never saw the money paid to M'r Pabor. I never knew that M'r Pabor gave receipts.

And the plaintiff, to further maintain the issue on its part, called as a witness on its behalf George Somers, who, being duly sworn, testified as follows:

Reside in Colorado Springs since February, 1872. Am by occupation an architect and civil engineer. Am familiar with town plat.
82 Am employed by the Springs Company. Lot one, in block ninety-two, is in the south-east quarter of the northwest quarter of section eighteen, in township fourteen south, of range sixty-six west. Lot one, in block ninety-two, is at corner of Pike's Peak avenue and Tejon streets, fronting on Pike's Peak avenue. Is occupied by M'r Cowell as a billiard parlor, Johnnie's Billiard Parlor, in 1873, prior to October, 1873. It is one hundred and seven and a half feet back to M'r Martin's, in the rear of post-office and bank. Johnnie's Billiard Parlor was used for billiard and drinking saloon. I don't know who was proprietor prior to October, 1873. I drank there, I think, before October, 1873. I saw parties playing billiards and drinking, I suppose. I stood and talked to some of my friends, and smoked cigar. I drank in the rear of the house, at the bar. I drank beer. Doctor Gatchell, Joseph Wilson, and J. True, I think, drank. I drank but once. It was of easy access, persons going and coming. I can say on oath, I think, it was.

83 And the plaintiff, to further maintain the issue on its part, introduced and caused to be sworn as a witness in its behalf M. L. De Coursey, who, being duly sworn, testified as follows:

Reside in Colorado Springs since November, 1871. Employed in Colorado Springs as officer from February or March, 1872, until August 1,

1873; assistant secretary and assistant treasurer. I kept the books, received money, and disbursed it. I exercised control, and located lots; sold them as if they were my own. I exercised control over lot one, in block ninety-two. I think M'r Cowell bought the lot. (Here witness identified deed from Springs Company, the plaintiff, to defendant Cowell.) The deed to Cowell is the only form I know of. I delivered the deed to M'r Cowell; delivered it in the general office of the Springs Company. He got the deed when he paid the money. There was no conversation. Lot one (1), in block ninety-two.

Cross-examination:

84 The lot was sold before the time, I presume six months or a year, M'r Pabor, who was acting assistant treasurer, issued certificate of membership in Fountain Colony. Locations were marked on the back of them. He was notified when he paid the balance and made his improvements to call and get his deed. M'r Pabor issued them. I took one of them, the last issued in Fountain Colony. The Fountain Colony of Colorado is mentioned in the certificates. Was acting assistant treasurer in May, 1872. M'r Pabor was secretary and acting as treasurer. No words passed. Didn't know of any bargain made. He had located the lots. When he complied and located they were supposed to be his lots. I think he had a house and a fence around part of it. No company's name is mentioned in certificate. Colorado Springs Company located them.

And the plaintiff, to further maintain the issue on its part, introduced and caused to be sworn as a witness on its behalf J. M. Bolton, who, being duly sworn, testified as follows:

85 Reside in Colorado Springs; have resided there fourteen months. Am printer. I know the frame building with sign of Johnnie's Billiard Parlor prior to October, 1873. Am not positive. Have been there. I was in August, 1873. Played billiards, ten-pins, and drank beer. A bar was there. I drank. John McDowell or M'r Cowell served me; I am not positive. John McDowell and M'r Cowell kept it in latter part of August. At noon I would see him there. It was in Colorado Springs, El Paso County, Colorado Territory; quite easy of access. Denver beer and fermented liquor there. Saw other persons there before October first, in the back part. It was a short distance from Tejon street; three steps. Could obtain drinks easy. Drank with printers; general class of drinks.

Re-examination:

I played ten-pins; am not positive. I embrace only August and September. McDowell and Cowell both served me with liquor there both in August and September.

86 And the plaintiff, to further maintain the issue on its part, introduced and caused to be sworn as a witness in its behalf George Trimble, who, being duly sworn, testified as follows:

Resided in Colorado Springs in August and September, 1873. I know this building; it had a sign of a laundry, corner of Pike's Peak avenue and Tejon streets. I was there every month when it was opened; know it was prior to fall term of court. I was living there. I was there when it was open. I done various things there. It might be a month did not elapse prior to October 1, 1873. I don't know positive whether it did or not.

And the plaintiff, to further maintain the issue on its part, introduced and caused to be sworn, as a witness in its behalf, A. M. Shepard, who, being duly sworn, testified as follows:

Resided in Colorado Springs in August and September, 1873; know Cowell; know their place of business, corner of Pike's Peak avenue and Tejon street, Johnnie's Billiard Parlor, in August or September, 1873; could not say which was there in August; played billiards. I
87 think I drank there in place called bar-room, public bar. I believe I called for a milk-punch; drank beer; could not say as I drank anything else; saw others drink; drank lager beer. There were others there; it was easy of access; several in the room.

And the plaintiff, to further maintain the issue on its part, introduced and caused to be sworn, as a witness in its behalf, F. Williams, who, being duly sworn, testified as follows:

Lived in Colorado Springs in August, 1873; know M'r Cowell; know building corner of Pike's Peak avenue and Tejon street; have been there in August, 1873. M'r Cowell was one of the proprietors. I drank there in back part. There was a bar in room. I drank beer and whiskey; it felt intoxicating to me. Other persons drank. M'r Cowell served drinks, or some of them, to me.

Cross-examination:

I know time; went there in August.

And the plaintiff, to further maintain the issue on its part, in-
88 troduced and caused to be sworn, as a witness in its behalf, Frank Cavender, who, being duly sworn, testified as follows:

Reside in Colorado Springs; resided there in August or September, 1873; was in Johnnie's Billiard Parlor, I think, in September; was there, and served by M'r Cowell and I think by McDowell; drank beer; some took milk-punch's, whiskey, and beer.

And the plaintiff, to further maintain the issue on its part, introduced and caused to be sworn, as a witness in its behalf, E. C. Kimball, who testified as follows:

Am acquainted with Cowell; was so in 1873; had conversation with him; not particularly about deeds; we talked about the time he was fixing up saloon in August; he was taking partitions out of staircase. I halted and asked what he was doing. He replied he was going to sell whiskey; thought it was in joking manner; said he was going to open a billiard parlor and saloon; said no court would sustain the conditions in the deed; said he would take the chances; somebody else
89 would sell liquor if he didn't; that there was more money in that business than in any other. The conversation took place prior to the opening.

And thereupon the defendants, by their counsel, moved the court to exclude the said testimony of said witness from the consideration of the jury; and the motion was overruled by the court, to which opinion and decision of the court in overruling said motion defendants, by their counsel, then and there excepted.

And the plaintiff rested the case; and thereupon the said defendants,

by their counsel, made their motion to non-suit the said plaintiff, which said motion was in the words and figures following:

In district court, 3d judicial district. April term, A. D. 1874.

TERRITORY OF COLORADO,
County of El Paso:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL & JOHN MCDOWELL.

90 Now, on this day come the defendants, the plaintiffs having rested their case, and move the court to arrest the case from the jury and give judgement as of non-suit, for the reason that the plaintiff has produced no sufficient evidence to sustain a verdict in this cause.

G. W. MILLER,
Att'y for Def'ts.

Which said motion was overruled by the court, to which opinion and decision of the court in overruling said motion, defendants, by their counsel, then and there excepted.

And the defendants, to maintain the issue on their part, introduced and caused to be sworn as a witness on their beha f E. C. Kimball, who testified as follows:

"I suppose there is such a company as the Colorado Springs Company. I located lots in April, 1872. I saw them on the map and located them. I was in Chicago. I sent fifty dollars, and a certificate was sent me with Mr. Pabor's name signed to it; am acquainted with this build-
91 ing; commenced building it in May, 1872. I think Cowell arrived at Springs in May; it was before October, 1873, when Mr. Cowell took possession of that property and located the lot; don't know as he occupied the property all the time.

Cross-examination:

He arrived in May. He built in May. He was in La Font House early part of last summer or spring. His mother-in-law and wife's sister were in tl e house during his absence; don't know of any other person being in possession. In August, 1873, he removed to premises. He has not been out of possession from that time to this.

And the defendants, to further maintain the issue on their part, introduced and caused to be sworn as a witness in their behalf D. A. Cowell, who testified as follows:

Am defendant in this case; know where the lot in dispute is located. I purchased the lot of Fountain Colony. I bought a colony cer-
92 tificate. It bore William E. Pabor's signature. I came to Colorado Springs with that certificate the last of April. I there received another certificate by paying fifty dollars more, by which I could locate two lots. Mr. Pabor's name was on the certificate. I saw him issue others. Mr. Pabor said I would have to improve my lots, and by paying the additional amount I could get the lots. I located lots designated on certificate in the office at the time. Mr. Pabor signed location indorsed on certificate May 15, 1872. He told me that was the common way to locate lots. He told me I had to improve satisfactorily within four months. Was to pay more money when I got deed, and one

hundred and fifty dollars more was to be paid before I should get deed; paid balance to M. L. De Coursey, secretary and treasurer; didn't know of such company as Fountain Colony. Contracts of Fountain Colony were respected. Nothing was said about character of deed. I gave De Coursey money, and he delivered deed to me. I borrowed money from real-estate man, and borrowed money on the deed. I did
93 not see it for a year afterwards. I occupied lot from time of location. Improved to amount of two thousand dollars. Officers of company were about town. Was a ball alley there in October, 1873. I opened October 2, 1873. When De Coursey handed me the deed he said nothing about conditions. Total reduction to each member of family was 17½. I discovered after I had received deed the covenant. I never knew of any other sort of deed being executed. I think I saw circular, prohibiting sale of liquor, in Chicago when I got certificate of membership.

And the defendants thereupon offered in evidence two certificates of membership of the Fountain Colony of Colorado, together with the indorsements thereon, which said certificates with the indorsements thereon were severally in the words and figures following:

No. 89.

Certificate of membership of the Fountain Colony of Colorado.

COLORADO SPRINGS, COLO.,
April 6, 1872.

94 This certifies that David A. Cowell has paid into the treasury of the Fountain Colony of Colorado, the sum of fifty dollars, $50, and is thereby entitled to all the rights and privileges appertaining to such membership.

This certificate is assignable and transferable upon the proper endorsements.

$100.

W'M E. PABOR,
Sec'y, for Treasurer.

With the endorsement thereon as follows: "D. A. Cowell. No. 89. Taken up May 15, 1872. No. 89½ issued."

89½.

Certificate of membership of the Fountain Colony of Colorado.

COLORADO SPRINGS, COLO.,
May 15, 1872.

This certifies that D. A. Cowell has paid into the treasury of the Fountain Colony of Colorado the sum of one hundred dollars ($100), and is thereby entitled to all the rights and privileges appertaining to such membership.

This certificate is assignable and transferable upon the proper endorsement.

95 W'M E. PABOR,
Sec'y, for Treasurer.

(Indorsed:) Lot 1, block 92. Lot 21, block 83. Located May 15th. W. E. P.

This was all the testimony on either side in the cause.

And the same being argued by George W. Miller, of counsel for the defendant, to the jury, the said George W. Miller in his said argument made some remarks on Cowell's testimony of the fact that he knew not that the forfeiture clause was in the deed at the time it was handed to him by De Coursey. The court stopped the counsel, remarking in the hearing of the jury, that the court would not permit the counsel to argue before the jury that there was fraud or deception in the execution of the deed; to which interference of the court with said counsel in his said argument and the remarks aforesaid in the presence
96 of the jury, the defendants by their counsel then and there excepted.

And the defendants asked the court to instruct the jury in writing, as follows:

"1. The court instructs the jury that the evidence does not support the declaration & that they find for the defendant.

"2. If David A. Cowell was in actual possession of the premises described in the declaration and was building a house thereon prior to & at the time of the acknowledgments of the deeds by Charles B. Lamborn, trustee, & Rob't H. Lamborn, pres't, M. L. & I. Co., offered in evidence by plaintiff under a prior purchase from the Fountain Colony of Colorado, Cowell's possession as aforesaid was notice of his rights, & nothing contained in said deeds could defeat the rights of Cowell previously acquired, & the pl'ff cannot recover title derived through said deeds.

97 "3. If the jury believe from the evidence that on the 5th of April & the 15th of May, 1872, the Fountain Colony of Colorado were selling lots in the town of Colorado Springs, issuing certificates of location, putting parties into possession, receiving their money, and inducing them to erect buildings thereon, & that Cowell as others so purchased the premises described in the declaration and had improved and occupied the same under the purchase aforesaid as a place of business and a home for himself & family from that date to the present, they will find for the defendants.

"4. If the jury believe from the evidence that Cowell purchased and entered into possession of the premises described in the declaration in good faith, understanding that the only conditions were the payment of money & the erection of certain improvements, & he paid the money and made the improvements according to contract, no condition put into the deed executed from plaintiff to Cowell without Cowell's
98 consent could defeat Cowell's rights & entitle the plaintiff to recover in this action.

"5. If the def't Cowell has occupied the premises as a house & place of business, continuously from 1872 up to this time & created improvements thereon of great value, this is prima-facie evidence of title in fee in defendant, & to entitle plaintiff to recover it must show a perfect title in itself unless the defendant's possession was acquired from plff.

"6. Before plaintiff can recover on a title based on prior possession, the possession must be actual and not merely constructive, & must be clearly proven to be prior to that of the defendant.

"7. If the jury believe from the evidence that plff. by its authorized agent sold the premises described in the declaration to defendant on condition that if he would improve the same & pay so much money he should have a deed, & that deft. performed his part of the contract
99 & plff. accepted the purchase money, Cowell was entitled to a deed according to the contract he purchased & took possession

"8. If the jury believe from the evidence that W. E. Pabor was an officer of the Colorado Springs Company and acting by the authority of the company in contracting lots to individuals, and so authorized and acting, contracted with the defendant, plff. is bound by the contract.

"9. If the jury believe from the evidence that the plaintiff through its authorized agents contracted the premises described in the declaration to defendant, and put him into possession under a promise that he should have a deed on making improvements and paying money without saying anything about a clause of forfeiture, and that defendant made the improvements and paid the money according to contract, & pl'ff received it without the knowledge or consent of defendant inserted a clause of forfeiture in the deed, such insertion was a fraud
100 of the rights of the defendant and plaintiff cannot recover.

"10. The word deed means a deed without a forfeiting clause."

And the court refused to give to the jury the said instructions and each of them, to which refusal of the court to give said instructions and each of them to the jury defendants, by their counsel, then and there excepted.

And thereupon the court gave to the jury the following instructions in writing:

"The patent from the government and the several conveyances from Lamborn and the National Land and Improvement Company are sufficient to vest in the plaintiff a title in fee to the premises therein described.

"If the defendant Cowell accepted the deed given in evidence in which the plaintiff appears as grantor, he is bound by the condition therein expressed; and if thereafter and before the commencement of this suit he opened a public resort upon the premises therein described
101 and there sold intoxicating liquors as a beverage, the deed thereby became inoperative, and the title to the premises in controversy reverted to the plaintiff.

"If the facts are as above supposed the plaintiff may recover.

"Whether the conveyance to Cowell was fraudulently imposed upon him or the condition in respect to the sale of intoxicating liquors inserted therein in fraud of his rights is not a question for your consideration, as there is nothing in the evidence presenting that question.

"No title is shown in McDowell, and his rights are subject to the rule above laid down.

"If you find for plff. your verdict should be, 'We find defendants guilty and that plaintiff is the owner in fee of the premises described in the declaration.' If you find for defendants your verdict should be, 'We the jury find the defendants not guilty.'"

102 To the giving of which said instructions to the jury defendants, by their counsel, then and there excepted.

And the jury after retiring returned into open court with the following verdict, to wit:

"We the jury find defendant guilty, and that plaintiff is the owner in fee of the premises described in the declaration."

To which said verdict defendants, by their counsel, then and there excepted, for the reason that said finding of the jury was not responsive to the issue.

And the defendants made their motion for a new trial in said cause, which said motion for a new trial was in the words and figures following:

Motion for new trial.

District court, 3d judicial district, June term, A. D. 1874.

TERRITORY OF COLORADO,
County of Pueblo:

103 THE COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL & JOHN MCDOWELL. } Ejectment.

And now comes the defendant, and by his attorneys, John W. Henry & Geo. W. Miller, and moves the court to set aside the verdict and grant a new trial in this cause, and for grounds of said motion shows to the court the following, viz:

1. The court admitted on the trial improper evidence offered by the plaintiff, viz, the papers marked A, D, C, E, F, G, and also the evidence of Kimball, and the other evidence objected to, to which exceptions were asked during the trial.

2. The court erred in refusing proper evidence offered on the part of def't, viz, papers marked A & B, and also in refusing to allow the witnesses Cowell & Kimball answer the questions, to which exception was taken at the time, & also in refusing the offer of proofs ten-
104 dered on part of def't.

3. The court erred in refusing to non-suit the plaintiff on motion of defendant.

4. The court erred in the charge given to the jury.

5. The court erred in refusing the instructions asked by def't.

6. The court erred in stopping defendant's counsel in his argument, & the oral remarks then made in the hearing of the jury, as appears in papers marked C, hereto attached, and made part of this motion.

7. The verdict of the jury is contrary to the law and evidence.

8. And for other good and sufficient reasons.

J. W. HENRY & GEO. W. MILLER,
Att'ys.

Which said motion for a new trial was overruled by the court,
105 to which opinion and decision of the court in overruling said motion for a new trial defendants, by their counsel, then and there excepted.

And thereupon defendants made their motion in arrest of judgment, which said motion was in the words and figures following:

Motion in arrest.

In the district court, 3d judicial district, June term, A. D. 1874.

TERRITORY OF COLORADO,
County of Pueblo:

COLORADO SPRINGS COMPANY
vs.
DAVID A. COWELL AND JOHN MCDOWELL. } Ejectment.

Now, on this day, comes the def't David A. Cowell, & by his attorneys, J. W. Henry & George W. Miller, & moves the court to arrest the judgment in the above-entitled cause for the following reasons:

106 1. There is no sufficient verdict on which to enter judgment.
2. The verdict does not determine the issue as to who is entitled to possession & occupancy.
4. The verdict is not responsive to the issue joined.
5. The verdict shows the finding of the jury to be against defendant, and not against defendants, and does no' show which defendant was meant.
6. The verdict finds neither the one way nor the other as to one of the def'ts, and does not show which def't was included or which omitted, said verdict being in these words only:

We, the jury, find defendant guilty, and that plaintiff is the owner in fee of the premises described in the declaration.

JOHN T. COLLIER, *Foreman.*

7. The verdict shows no time when any one was owner of the premises, and is not in accordance with the statutes of Colorado.
107 8. The verdict does not describe any premises or set forth any metes and bounds.
9. The verdict, such an estate, if any, as the law does not permit pl'ff to own.
10. For other good & sufficient reasons appearing of record in this cause.

J. W. HENRY & GEO. W. MILLER, *Att'ys.*

And the court overruled said motion and gave judgment for the plaintiff, to which decision of the court in overruling said motion and giving judgment for the plaintiff, defendants, by their counsel, then and there excepted.

And inasmuch as the matters aforesaid do not appear of record in this cause, the said defendants present this bill of exceptions and ask that the same may be signed and sealed and made part of the record in this cause, and it is done accordingly.

[SEAL.] MOSES HALLETT,
C. J. & Judge, &c.

108 TERRITORY OF COLORADO,
County of Pueblo, ss:

I, Geo. A. Bute, clerk of the district court of the third judicial district of Colorado Territory, within and for the county of Pueblo, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record in a certain cause pending in said court on the law side thereof, wherein the Colorado Springs Company is plaintiff and David A. Cowell and John McDowell are defendants.

In witness whereof I have hereunto affixed the seal of said court and set my hand this first day of February, A. D. 1875.

[SEAL.] GEORGE A. BUTE, *Clerk.*

(Endorsed:) G. D., No. 233. Term No. 103. David A. Cowell, appellant, vs. The Colorado Springs Company, appellee. Transcript. Filed February 20, 1875. Jno. W. Webster, clerk.

109 And afterwards, on, to wit, on the 20th day of February, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado, the assignment of errors in the above-entitled cause, which are in words and figures as follows, to wit:

Assignment of errors.

In supreme court, February term, A. D. 1875.

TERRITORY OF COLORADO, *ss*:

DAVID A. COWELL, APPELLANT,
vs.
CHARLES H. STEWART, APPELLEE.

And now comes the said appellant, by Miller, Beck & Clough, his attorneys, and says that in the record of proceedings in said cause there is manifest error in this, to wit:

1. The district court erred in overruling the motion of appellant for a new trial. (Folio 183–186.)

2. The district court erred in overruling the motion of appellant to arrest the judgment in said cause. (Folio 187–189.)

110 3. The verdict of the jury is against the evidence in the cause.

4. The verdict of the jury is informal and insufficient and does not find the issues joined, and does not specify the estate to which the appellee was entitled as required by law, and does not find the issues as to both defendants, and does not specify either of the different premises described in the first or second count of the declaration.

5. The district court erred in rendering judgment in said cause in this, to wit, that the judgment is rendered for the premises described in the first count of the declaration and not for those described in the second count or in both counts of said declaration, and that the premises described in said judgment are other and different from those described in the second count of said declaration. (Folio 63–65.)

6. The district court erred in overruling appellant's objections and admitting as evidence on the part of appellee the patent from the

111 United States to Charles B. Lamborn as trustee. (Folio 75–100.)

7. The district court erred in overruling appellant's objections and admitting as evidence on the part of appellee the deed from Charles B. Lamborn, trustee, to the National Land and Improvement Company. (Folio 101–114.)

8. The district court erred in overruling the appellant's objections and in admitting as evidence the deed from the National Land and Improvement Company to the Colorado Springs Company. (Folio 116–130.)

9. The district court erred in overruling the appellant's objections and in admitting as evidence the deed from the appellant to the appellee. (Folio 131–141.)

10. The district court erred in stopping the appellant's counsel in his argument to the jury and in refusing to permit such counsel to present his views on the evidence as to the insertion of the forfeiture clause in the deed from the appellee to appellant which had been given in evidence. (Folio 171.)

112 11. The district court erred in refusing to instruct the jury that "The court instructs the jury that the evidence does not support the declaration, and that they find for the defendant." (Folio 172.)

12. The district court erred in refusing to instruct the jury that "If David A. Cowell was in actual possession of the premises described in the declaration and was building a house thereon prior to and at that time of the acknowledgement of the deeds by Charles B. Lamborn, trustee, and Robert H. Lamborn, president of the N. Land I. Co., offered in evidence by plaintiff under a prior purchase from the Fountain Colony

of Colorado, Cowell's possession as aforesaid was notice of his rights and nothing contained in said deeds could defeat the rights of Cowell previously acquired, and the plaintiff cannot recover title derived through said deeds." (Folio 173.)

13. The district court erred in refusing to instruct the jury that "If the jury believe from the evidence that on the 5th day of April and the
113 15th day of May, 1872, the Fountain Colony of Colorado were selling lots in the town of Colorado Springs, issuing certificates of locations, putting parties into possession, recovering their money, and inducing them to erect buildings thereon, and that Cowell as others so purchased the premises described in the declaration and had improved and occupied the same under the purchase aforesaid as a place of business and a home for himself and family from that date to the present, they will find for the defendants."

14. The district court erred in refusing to instruct the jury that "If the jury believe from the evidence that Cowell purchased and entered into possession of the premises described in the declaration in good faith, understanding that the only conditions were the payment of money and the erection of certain improvements, and he paid the money and made the improvements according to contract, no condition put into the deed executed from the plaintiff to Cowell without Cowell's consent could defeat Cowell's rights and entitle the plaintiff to recover in this action." (Folio 175.)

114 15. The district court erred in refusing to instruct the jury that "If the defendant Cowell has occupied the premises as a home and a place of business continuously from 1872 up to this time, and erected improvements thereon of great value, this is prima-facia evidence of title in fee in defendant, and to entitle plaintiff to recover, it must show a perfect title in itself unless the defendant's possession was acquired from plaintff." (Folio 176.)

16. The district court erred in refusing to instruct the jury that "Before plaintiff can recover on a title based on prior possession, the possession must be actual and not merely constructive and must be clearly proven to be prior to that of the defendant." (Folio 176.)

17. The district court erred in refusing to instruct the jury that "If the jury believe from the evidence that the plaintiff by its authorized agent sold the premises described in the declaration to defendant on condition that if he would improve the same and pay so much money he should have a deed, and that defendant performed his part of
115 the contract and plaintiff accepted the purchase-money, Cowell was entitled to a deed according to the contract under which he purchased and took possession." (Folio 177.)

18. The district court erred in refusing to instruct the jury that "If the jury believe from the evidence that W. E. Pabor was an officer of the Colorado Springs Company and acting by the authority of the company in contracting lots to individuals, and so authorized and acting contracted with the defendant, plaintiff is bound by the contract." (Folio 177.)

19. The district court erred in refusing to instruct the jury that "If the jury believe from the evidence that the plaintiff through its authorized agents contracted the premises described in the declaration to defendant, and put him into possession under a promise that he should have a deed on making improvements and paying money without saying anything about a clause of forfeiture, and that defendant made the improvements and paid the money according to contract, and the

116 plaintiff received it without the knowledge or consent of defendant *of the defendant* inserted a clause of forfeiture in the deed, such insertion was a fraud of the rights of the defendant, and plaintiff cannot recover." (Folio 178–179.)

20. The district court erred in refusing to instruct the jury that "The word deed means a deed without a forfeiting clause." (Folio 179.)

21. The district court erred in instructing the jury that "The patent from the government and the several conveyances from Lamborn and the National Land and Improvement Company are sufficient to vest in the plaintiff a title in fee to the premises therein described." (Folio 179–180.)

22. The district court erred in instructing the jury that "If the defendant Cowell accepted the deed given in evidence, in which the plaintiff appears as grantor, he is bound by the condition therein expressed; and if thereafter and before the commencement of this suit he opened a public resort upon the premises therein described and
117 there sold intoxicating liquors as a beverage, the deed thereby became inoperative and the title to the premises in controversy reverted to the plaintiff. If the facts are as above supposed, the plaintiff may recover." (Folio 180.)

23. The district court erred in instructing the jury that "Whether the conveyance to Cowell was fraudulently imposed upon him or the condition in respect to the sale of intoxicating liquors inserted therein in fraud of his rights is not a question for your consideration, as there is nothing in the evidence presenting that question." (Folio 181.)

24. The district court erred in instructing the jury that "No title is shown in McDowell, and his rights are subject to the rule above laid down." (Folio 181.)

25. The district court erred in instructing the jury that, "If you find for the plaintiff, your verdict should be, 'We find the defendants guilty and that plaintiff is the owner in fee of the premises described in
118 the declaration.' If you find for defendants, your verdict should be, 'We the jury find the defendants not guilty.'" (Folio 181–182.)

26. The district court erred in overruling the motion of the appellant for judgment as of nonsuit. (Folio 162–163.)

27. The district court erred in overruling the motion of appellant, and in refusing to exclude the testimony of the witness E. C. Kimball, sworn for appellee, as to the sale of intoxicating liquors on the premises in controversy, from the consideration of the jury. (Folio 161.)

Wherefore the said appellant prays judgment and that said cause may be reversed, etc.

By MILLER, BECK & CLOUGH,
His Attorneys.

(Endorsed:) G. D. 233. Term No. 103. David A. Cowell, appellant, vs. Colorado Springs Company, appellee. Assignment of error. Filed February 20, A. D. 1875. Jno. W. Webster, clerk.

119 And afterwards, on, to wit, the 19th day of March, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado the joinder in error in the above-entitled cause, which is in words and figures as follows, to wit:

Joinder in error.

In the supreme court, of the February term, A. D. 1875.

TERRITORY OF COLORADO, *ss:*

DAVID A. COWELL ET AL.
vs.
COLORADO SPRINGS COMPANY.

And the said Colorado Springs Company, defendant in error, by Davidson & Harrison, its attorneys, comes and says that there is no error either in the record and proceedings aforesaid or in giving judgment aforesaid in manner and form as above assigned, and therefore prays that the said judgment may be affirmed, and that his costs may be adjudged to him, &c.

By DAVIDSON & HARRISON,
For Defendants in Error.

120 (Endorsed:) G. D., No. 233. Supreme court. David A. Cowell et al. vs. Colorado Springs Company. Joinder in error. Filed March 19, 1875. Jno. W. Webster, clerk.

And afterwards, on, to wit, the same 19th of March, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a stipulation in the above-entitled cause, which is in words and figures as follows, to wit:

In the supreme court, February term, A. D. 1875.

TERRITORY OF COLORADO, *ss:*

DAVID A. COWELL ET AL., APPELLANT,
vs.
COLORADO SPRINGS COMPANY, APPELLEE.

It is hereby stipulated and agreed by and between the parties to this suit that the record filed in this court be corrected and amended
121 in this, that the declaration read "twenty-five feet by one hundred and five feet," instead of "twenty-four feet by one hundred and five feet," wherever the same occurs in the declaration in said record as certified by the clerk of the court of third judicial district in and for the county of Pueblo, the said misdescription being a clerical error of the aforesaid clerk.

MILLER, BECK & CLOUGH,
V. D. MARKHAM,
For Appellants.
DAVIDSON & HARRISON,
For Appellees.

(Endorsed:) G. D., 233. David A. Cowell et al. vs. Colorado Springs Co. Stipulation. Filed March 19, 1875. Jno. W. Webster, clerk.

And afterwards, on, to wit, the 2nd day of April, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a stipulation to file arguments in the above-entitled
122 cause, which is in words and figures as follows, to wit:

In the supreme court, February term, A. D. 1875.

TERRITORY OF COLORADO, *ss:*

DAVID A. COWELL ET AL., APPELLANT,
vs.
COLORADO SPRINGS COMPANY, APPELLEE.

It is agreed in this case that the appellant may take ninety days to file his printed or written argument, the appellee sixty days to answer, and the appellant thirty days to reply.

V. D. MARKHAM,
MILLER, BECK & CLOUGH,
For App't.
DAVIDSON & HARRISON,
For Appellee.

(Endorsed:) G. D., 233. David A. Cowell et al. vs. Colorado Springs Company. Stipulation to file arguments. Filed April 2, 1875. Jno. W. Webster, clerk.

123 And afterwards, on, to wit, the 14th day of August, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a certain other stipulation in the above-entitled cause, which is in words and figures as follows, to wit:

In the supreme court, February term, A. D. 1875.

TERRITORY OF COLORADO, *ss:*

DAVID A. COWELL ET AL., APPELLANT,
vs.
COLORADO SPRINGS COMPANY, APPELLEE.

It is agreed that the stipulation on file in the above case be so extended that the appellee shall have until the 1st *first* of October, A. D. 1875, to file written or printed arguments and brief, and the appellee until the first of December, A. D. 1875, to reply.

MILLER, BECK & CLOUGH,
For Appellants.
124 DAVIDSON & HARRISON,
Att'y for Appellee.

(Endorsed:) David A. Cowell, appellant, vs. The Colorado Springs Co., appellee. Stipulation. Filed August 14, 1875. John W. Webster, clerk.

And afterwards, on, to wit, the 22nd day of October, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a certain other stipulation in the above-entitled cause, which is in words and figures as follows, to wit:

In the supreme court, February term, A. D. 1875.

TERRITORY OF COLORADO,
Arapahoe County:

DAVID A. COWELL, APPELLANT,
vs.
COLORADO SPRINGS COMPANY, APPELLEE.

125 It is stipulated that the appellant may have until the 1st day of the next term of this court in which to file his reply to the an-

swer of the argument of the appellant's counsel, it being understood that the case is to be tried, heard, and decided at the February term of the supreme court, 1876.

DAVIDSON & HARRISON,
Att'ys for Appellee.
MILLER, BECK, & CLOUGH,
Att'ys for Appellant.

(Endorsed:) G. D. 233. David A. Cowell vs. Colorado Springs Company. Stipulation. Filed October 22, 1875. Jno. W. Webster, clerk.

And afterwards, on, to wit, the 10th day of February, A. D. 1876, the same being one of the regular juridical days of the February term, A. D. 1876, of the supreme court of the Territory of Colorado, the following, among other proceedings, were had in said court in said cause
126 and entered of record, which are in words and figures as follows, to wit:

Appeal from district court, Pueblo County.

DAVID A. COWELL, APPELLANT,
vs.
THE COLORADO SPRINGS COMPANY, APPELLEE.

Now on this day comes the said appellant, by Messrs. Miller, Beck & Clough & V. D. Markham, esq., his attorney; and the said appellee, by W'm Harrison, esq., its attorney, also comes; and this cause coming on to be heard was submitted to the consideration and judgment of the court, and judgment thereon is reserved until another day.

And afterwards, on, to wit, the 21st day of March, A. D. 1876, the same being one of the regular juridical days of the February term, A. D. 1876, of the supreme court of the Territory of Colorado, the following, among other proceedings, were had in said court in said cause, and entered of record, which are in words and figures as follows, to wit:

127 Appeal from district court, Pueblo County.

DAVID A. COWELL, APPELLANT,
vs.
THE COLORADO SPRINGS COMPANY, APPELLEE.

Now on this day comes the said appellant, by Messrs. Miller, Beck & Clough and V. D. Markham, esq's, his attorneys, and the said appellee, by W'm Harrison, esq., its attorney, also comes, and this cause comes on to be heard as well upon the transcript of judgment and other proceedings had in the said district court for the county of Pueblo as also upon the matter herein assigned for error; and it appearing to the court that there is no error in the record and proceedings aforesaid, nor in giving judgment aforesaid, it is considered by the court that the judgment in form aforesaid given be in all things affirmed and stand in full force and effect. That the opinion of the court filed herein be recorded, and that said appellee do have and recover of and from the said appel-
128 lant its costs and charges in this behalf expended, to be taxed, and that it have execution therefor.

And afterwards, on, to wit, the 23d day of March, A. D. 1876, there was filed in the office of the clerk of the supreme court of the Territory

of Colorado a writ of error in the above entitled cause, the original of which is hereto attached, and is in words and figures as follows, to wit:

129 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Colorado, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between the Colorado Springs Company and David A. Cowell a manifest error hath happened, to the great damage of the said David A. Cowell, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, the eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] JNO. W. WEBSTER,
Clerk of the Supreme Court of the Territory of Colorado.

Allowed by—

MOSES HALLETT,
C. J. Sup. Court, Col. Ter.

(Indorsed:) David A. Cowell, pl'ff in error, vs. Colorado Springs Company, d'f't in error. Original writ of error. Filed March 23, 1876. Jno. W. Webster, clerk.

130 And afterwards on, to wit, the 29th day of March, A. D. 1876, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a supersedeas bond in the above entitled cause, which is in words and figures as follows, to wit:

Know all men by these presents that we, David A. Cowell and Albert K. Tilton are held and firmly bound unto the Colorado Springs Company in the full and just sum of one thousand dollars, to be paid to the Colorado Springs Company, its certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents. Sealed with our seals, and dated this 24th day of March, A. D. eighteen hundred and seventy-six.

Whereas, lately, at a session of the supreme court of Colorado Territory, in a suit depending in said court between David A. Cowell, appellant, and the Colorado Springs Company, appellee, judgment was
131 rendered against the said David A. Cowell, appellant, and the said David A. Cowell, appellant, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Colorado Springs Company, citing and admonishing it to be and appear at

a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such, that if the said David A. Cowell shall prosecute his writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

DAVID A. COWELL. [SEAL.]
ALBERT K. TILTON. [SEAL.]

Sealed and delivered in the presence of—
JNO. W. WEBSTER.
GEORGE W. MILLER.

132 Taken & approved by me this 29th day of March, A. D. 1876.

MOSES HALLETT,
C. J. Sup. Court Col. Ter.

TERRITORY OF COLORADO, *ss:*

Albert K. Tilton, being duly sworn according to law, deposes and says that he is worth five thousand dollars over and above his just debts and liabilities, free and exempt from execution, and that he has that amount of property within the Territory of Colorado.

ALBERT K. TILTON.

Subscribed and sworn to before me this 29th day of March, A. D. 1876.

[SEAL.] JNO. W. WEBSTER,
Clerk Supreme Court.

(Endorsed:) David A. Cowell, plaintiff in error, vs. The Colorado Springs Company, defendant in error. Supersedeas bond. Filed March 29th, 1876. Jno. W. Webster, clerk.

133 And afterwards on, to wit, the 30th day of March, A. D. 1876, there was filed in the office of the clerk or the supreme court of the Territory of Colorado a citation in the above-entitled cause, the original of which, with the endorsements thereon, is hereto attached, and is in words and figures as follows, to wit:

134 The United States of America to the Colorado Springs Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the Territory of Colorado, wherein David A. Cowell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Moses Hallett, chief justice of the supreme court of the Territory of Colorado, this eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-five.

MOSES HALLETT,
C. J. Sup. Court Col. Ter.

135 (Indorsed:) David A. Cowell, plaintiff in error, vs. The Colorado Springs Company, defendant in error. Citation. Filed March 30th, 1876. Jno. W. Webster, clerk.

On this 30th day of March, in the year of our Lord one thousand eight hundred and seventy-six, personally appeared George W. Miller before me, the subscriber, Jno. W. Webster, clerk supreme court of the Territory of Colorado, and makes oath that he delivered a true copy of the within citation to J. M. Davidson, one of the attorneys of record for the Colorado Springs Company.

GEORGE W. MILLER.

Sworn to and subscribed before me, this 30th day of March, A. D. 1876.

[SEAL.] JNO. W. WEBSTER,
Clerk Supreme Court Colorado Territory.

136 And afterwards, on, to wit, the 31st day of July, A. D. 1876, there was filed in the office of the clerk of the supreme court of the Territory of Colorado an affidavit of valuation in the above-entitled cause, which is in words and figures as follows, to wit:

In the Supreme Court of the United States. Error to the supreme court of Colorado Territory.

DAVID A. COWELL, PLAINTIFF IN ERROR,
vs.
THE COLORADO SPRINGS COMPANY. DEFENDANT IN ERROR.

David A. Cowell, being duly sworn according to law, on oath says that he is acquainted with the property in controversy in the above-entitled suit lately determined in the supreme court of the Territory of Colorado, and taken by writ of error from said supreme court of said Territory to the Supreme Court of the United States. That he knows the value of said property now, and the value thereof since be-
137 fore the commencement of said suit in the district court of the third judicial district of said Territory; that the said property is now, and since before the time last aforesaid has been, worth the sum of four thousand dollars in cash.

And further deponent saith not.

DAVID A. COWELL.

Subscribed and sworn to before me this 31st day of July, A. D. 1876.

[SEAL.] JNO. W. WEBSTER,
Clerk Supreme Court, Colorado Territory.

(Endorsed:) David A. Cowell, plaintiff in error, vs. The Colorado Springs Company, defendant in error. Affidavit of valuation. Filed July 31st, 1876. Jno. W. Webster, clerk.

138 And heretofore on, to wit, the 21st day of March, A. D. 1876, the same being one of the regular juridical days of the February Term, A. D. 1876, of the supreme court of the Territory of Clorado, there was filed in the office of the clerk of said court the opinion of the judges of said court in said cause, a copy of which is hereunto annexed, in accordance with the amendment to rule 8th of the Supreme Court of the United States, to be herewith transmitted, which is in words and figures as follows, to wit:

Opinion.

In the Supreme Court, Feb'y Term, 1876. Appeal from the district court of Pueblo County.

DAVID A. COWELL, APPELLANT,
vs.
COLORADO SPRINGS CO., APPELLEE.

BRAZEE, A. J.:

The appellee brought ejectment for certain premises, claiming title in fee simple. Plea, not guilty.

139 The evidence on the part of the plaintiff showed a certificate of its incorporation filed in the office of the county clerk and recorder of El Paso County, June 29th 1871. This certificate purported to incorporate appellee pursuant to the laws of Colorado, for the purpose of aiding & encouraging immigration to the Territory, and to purchase, acquire, hold, possess, sell, convey, and dispose of lands, town-lots, mineral springs, and other property; to build, construct, and operate ditches, wagon-roads, and mills for manufacturing lumber and other articles of wood.

The plaintiffs also gave in evidence an act of the general assembly of the State of Pennsylvania, incorporating the National Land and Improvement Company, with general corporate powers and power to receive, hold, and grant real and personal property; explore, locate, and improve lands; transport emigrants and merchandise, construct houses and buildings; manufacture, trade, and traffic; colonize, organize,

140 and form settlements; operate mineral and other lands, and improve and work the same. The evidence further showed a patent from the United States to Charles B. Lamborn, trustee, dated September 20th, 1870, conveying the lands in controversy among other lands, in all four hundred seventy-six acres and fifty-eight one-hundredths of an acre; a deed from Charles B. Lamborn, trustee, to the National Land and Improvement Company, of El Paso County, dated March 13th, 1872, conveying the lands in question with other lands, and covenanting for quiet and peaceable possession; consideration, sixteen thousand dollars. A deed dated March 14th, 1872, from the National Land and Improvement Company to the Colorado Springs Company, conveying the lands in question among other lands, with full covenants; consideration, thirty thousand dollars. A deed dated May 20th, 1873, from "the Colorado Springs Company, a corporation duly created under the laws of the Territory of Colorado," to the appellant, conveying the premises in controversy, with full covenants, and containing the following condition:

141 "Witnesseth that the said party of the first part, for and in consideration of the sum of two hundred and fifty dollars to it in hand paid by the said party of the second part, and also for the further consideration of the agreement between the parties hereto, for themselves, their heirs, successors, and legal representatives, that intoxicating liquors shall never be manufactured, sold, or otherwise disposed of as a beverage in any place of public resort in or upon the premises hereby granted, or any part thereof; and it is herein and hereby expressly reserved by the said party of the first part, that in case any of the above conditions concerning intoxicating liquors are broken by the said party of the second part, his assigns or legal representatives, then this deed shall become null and void, and all right, title, and interest

of, in, and to the premises hereby conveyed shall revert to the said party of the first part, its successors and assigns and the said party of the second part, by accepting this deed for himself, his heirs, executors, administrators, and assigns, consents and agrees to the reservations and conditions aforesaid."

142 Evidence was also given tending to show that after the execution and delivery of the last-mentioned deed the defendant had sold and disposed of intoxicating liquors as a beverage in a place of public resort upon the premises granted in the last-mentioned deed, and there was no evidence substantially tending to controvert the fact of such sale.

Defendant's motion for non-suit was overruled. The jury found defendant guilty and that the plaintiff was the owner of the premises described in the declaration. Defendant's motion for a new trial was overruled and judgment was given upon the verdict against the defendants.

It is objected that the jury found the defendant instead of the defendants guilty, and that this is error. The objection is merely technical. The defendants plead jointly to the declaration "not guilty." This made a single issue, which the jury were empaneled to try, and sufficiently identifies the parties defendant. It was competent for the court to have amended the verdict below, if the form of the verdict had been made the ground of exceptions, or to have sent the jury

143 out to further consider the form of their verdict. The verdict would no doubt have been corrected, in respect to form, in the court below, if attention had been called to it there. This specific objection comes too late here for the first time. If separate pleas had been interposed below by the defendants respectively, our decision might have been different, but here where there is but one defence, and the court can see that the issue has been disposed of upon the evidence, and that the jury may have used the word "defendant" as a noun of multitude to include all the parties defendant, we hold that the verdict by legal intendment is sufficient upon the issue and evidence in the case.

The objection to a verdict that it found "the issue" instead of "the issues" was held to come too late, on error, for the first time. (Laber vs. Cooper, 7 Wallace, 570.) In Henry vs. Halsey (5th Smeade and Marshall, 573), it was held that a verdict which found for "the plaintiff" instead of "the plaintiffs" was sufficient where the record showed

144 the jury were empaneled to try the issue.

There are two counts in the declaration. The verdict finds the plaintiff to be the owner in fee of the premises described in the declaration, judgment that the plaintiff recover the possession of the premises "according to the verdict of the jury," "as described in the declaration, to wit"; and then follows the description in the first count. Now appellant's counsel claim that the respective counts describe different parcels. We think they describe the same premises, but if we concede the contrary, inasmuch as the verdict covers the premises described in both counts, the plaintiff alone is prejudiced by a judgment for one parcel instead of two, and the appellant is not prejudiced thereby.

The objection to the patent as evidence, raised in the court below, viz: "there was no public act of the United States Congress as is referred to in said patent, and because the same is immaterial," as we shall show, are untenable, and, because they are not raised on the argument,

145 we regard them as waived. The objections urged on the argument to the patent were not raised below, but, if raised there, might have been obviated, and will not, therefore, be considered by us here.

The deed from the National Land and Improvement Company to appellee was objected to at the trial, on the ground that it "was not acknowledged as required by the laws of Colorado Territory."

The deed from appellee to appellant was objected to because the same was immaterial and that the condition could not be given in evidence.

It is urged on the argument that the certificates of acknowledgements to the deeds, respectively, show that the respective acknowledgements were those of individuals filling corporate offices and not of the corporations, and they were, therefore, without proof of acknowledgements by the respective grantors, nor entitled to record nor admis'ible in evidence. Attention was not called to this ground of objection at the trial.

If it had been suggested there it might have been removed by the
146 production of the original deeds, & proof of the corporate seals and signatures of the officers of the grantors. It is well settled that the true ground of objection to the admissibility of natural evidence offered which might be obviated must be suggested at the trial, or it cannot be considered afterwards. The ground of objection to the admissibility of these deeds urged before us—that they were not acknowledged by the grantors; that they were acknowledged by individuals and not by the corporations—were not suggested to nor passed upon by the court below; they cannot be made and considered now. (Cody vs. Butterfield, 1 Colo., 384; Consolidated G. Co. vs. Raber, id., 514; McGraw vs. Welsh, 2d id., 284.)

The patent and the deeds referred to were proved by certified copies without any affidavit being made that the originals were out of the power of the plaintiff and could not be procured. It is objected on the argument that these copies were therefore improperly received in evidence.

This objection was not taken below, ought not to be raised here,
147 and we have no right to consider it.

The learned counsel for the defendant is mistaken in his statement that the deed to the company's do' not embrace the lands in dispute.

It is claimed by the appellant that no corporation could be created for the purpose set forth in the certificate of incorporation under the law, and that appellee had no existence, and could neither take nor convey the title to land. Under section 1 of the act of March 2d, 1867 (14th U. S. Statutes at Large, page 426), the legislature of the Territory may by general acts of incorporation permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits.

Sections 1 and 2, chapter 18 (page 117), Rev. Stat. of Colorado of 1868, authorizes three or more persons, for the purpose of carrying on any kind of manufactoring, mining, mechanical, or chemical business; construct

wagon-roads, railroads, telegraph lines, dig ditches, build flumes,
148 run tunnels, or carry on any branch of business designed to aid in the industrial or productive interests of the country, to make, sign, and acknowledge certificates complying with the provisions of the statute, and thereby become a body politic and corporate.

This act was amended Feb'y 11th, 1870 (Laws of 1870, page 49), so as to authorize like numbers of persons to incorporate for the purpose of aiding, encouraging, and inducing emigration to this Territory; and to purchase, acquire, hold, possess, sell, convey, and dispose of town-lots and other property, whether real, personal, or mixed.

The Congressional act of June 10th, 1872 (17 U. S. Statute at Large, page 390), declares that the act of March 2d, 1867, referred to, "so far as relates to incorporations which have been, or which may hereafter

be created and organized for the business of mining, manufacturing, or other industrial pursuits; on (or?) the construction or operation of railroads, wagon-roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any charitable or scientific association, and for all rightful subjects of legislation consistent with the Constitution of the United States, under the general incorporation laws of any Territory of the United States, shall be construed as having authorized and as authorizing the legislative assemblies of the Territories of the United States by general incorporation act to permit persons to associate together as bodies corporate" for the purposes above named.

The learned counsel for the appellant have ignored in their argument the Territorial act of Feb. 11th, 1870, amending chapter 18 of the Revised Statutes, which is important to be considered in this connection. The incorporations of appellee, as expressed in the certificate under which it claims to have been incorporated, was, among other things, for the purpose of aiding and encouraging immigration to the Territory, and to purchase, acquire, hold, possess, sell, convey, and dispose of lands, town lots, mineral springs, and other property.

The Territorial act of February 11th, 1870, expressly authorizes corporations to be formed for these purposes.

The appellee, then, is legally incorporated for these purposes, unless the last-mentioned act is in contravention of the Constitution or laws of the United States.

Section 6 of the organic act enacts that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the constitution and the provisions of the act. Under this provision, there is no doubt that the legislature had power to provide for the creation of bodies corporate for the purposes contemplated in the organization of the appellee.

The Congressional act of March 2d, 1867, expressly prohibited the grant of private charters and especial privileges, but allowed general incorporation acts by the Territorial legislature authorizing bodies to incorporate for mining, manufacturing, and other industrial pursuits.

It is not necessary for us to decide whether this statute prohibited by implication the Territorial legislature from passing general laws authorizing the formation of corporations for other than mining, manufacturing, and other industrial pursuits under the maxim that the expression of one thing in a statute is the exclusion of another, nor whether the Territorial act of 1870 was in contravention of the Congressional act of 1867. The Congressional act of June 10th, 1872, has saved us this labor. That act declares that the act of March 2d, 1867, so far as it relates to incorporations which have been created for the purpose expressed in appellee's certificate, among others, under general incorporation laws of any Territory, shall be construed as having been authorized.

Before the passage of the act of 1872, appellee was a corporation de facto, created under the forms of law for legitimate beneficial purposes enuring to the benefit of the community as well as to the benefit of the corporators; it exercised the franchises which it claimed, and whatever doubts may have hung over the legitimacy of its birth have been removed by the act of 1872, and it is entitled to be treated as a corporation de jure from the time of filing its certificate of incorporation, capable of taking and conveying the title to real estate.

This conclusion is arrived at upon authority.

In Jameson vs. The People (16 Illinois Rep'ts, 258), it was held that where a municipal corporation has been recognized by acts of the general assembly empowering it to act, by issuing negotiable obligations, all inquiry into the original organization is precluded.

In McIntire vs. The Canal Company it was held that an act reciting that a corporation trustee had lost its right, and authorizing the purchase of its property for the State, recognized its existence and power to contract. (9 Ohio, 203.)

In the Black River and Utica Railroad Company vs. Barnard
153 (31st Barbour) the company while in the exercise of its corporate functions had been recognized by act of the legislature as a corporation, and it was held that it became by such recognition ipso facto a legal corporation.

It is claimed by the appellant's counsel that the act of 1872 did not retroact so as to give legality to appellee prior to this act.

That act in its terms is retroactive. "Shall be construed as having authorized," applied to the act of 1870, gives it effect from its inception, unless such effect is in contravention of the Constitution.

Saterlee vs. Mathewson was in ejectment. The plaintiff claimed title derived from Connecticut and the defendant under title derived from Pennsylvania. It appeared that the defendant had come into possession as tenant of the plaintiff. The court of common pleas decided in favor of the plaintiff on the ground that the defendant was estopped by reason of the tenancy from setting up his title, although it was the oldest
154 and best. Upon error the supreme court of Pennsylvania decided that by the law of that State the relation of landlord and tenant could not subsist under a Connecticut title, and upon this ground reversed the judgment and awarded a new trial. Before the retrial the legislature of Pennsylvania changed the law in this respect. The cause subsequently went to the Supreme Court of the United States, and it was there held that the statute which validated the void contract of tenancy did not thereby impair the obligation of a contract, and that although retrospective in its action it did not partake of the character of an ex post facto law, forbidden by the Constitution. (2 Peters, 413.) This doctrine was recognized in State vs. Squires (26 Iowa, 347).

The phrase ex post facto is held to apply to legislation respecting crimes. (Sedgwick on Construction, &c., of Statutory and Constitutional Law, 165.) But the appellant here is not in position to question the existence of the appellee collaterally in this action.

155 The Territorial legislature by the act of 1870 had attempted to provide by a general law the mode by which individuals could associate and acquire corporate powers similar to those exercised and claimed by the appellee. The language of the Supreme Court of the United States in an analogous case is applicable to this with slight change of language:

"Conceding the bank (appellee) to be guilty of usurpation, it was still a body corporate de facto exercising at least one of the franchises which the legislature attempted to confer upon it, and in such case the party who makes a sale of real estate to it, or buys real estate of it, is not in a position to question its capacity." (Smith vs. Sheeley, 12 Wallace, 361.)

Or we may adopt the language of the supreme court of Illinois and say: "Here then is a body de facto which had been engaged in an undertaking involving important interests. The regularity of its organization cannot be questioned collaterally, and alleged non-com-
156 pliance with the law can only be inquired into by the writ of quo

warranto or scire facias. Hence, it is improper in this case to discuss the right of the grantee in the deed to take or the power of the legislature to legalize the irregularities complained of." (Thompson vs. Candor, 60 Ill., 428.)

It is contended by appellant's counsel that the patent, since it is in excess of the quantity authorized, is void on its face. The patent purports to have been made according to the provisions of the act of Congress of 24th April, 1820, entitled "An act making further provision for the sale of public lands," and in conformity with the several acts of Congress in such case made and provided, section 1 of the act of 24th April, 1820, and other acts, under certain circumstances authorized the sale of public lands in sections, halves, quarters, and half quarters. (See U. S. R. S., chapter seven.)

There is therefore nothing on the face of the patent tending to show the quantity of land conveyed by it was in excess of the quantity authorized by law to be conveyed.

157 It is claimed that inasmuch as the patent grants the land to Charles B. Lamborn, trustee, without declaring the trust, the land was granted in trust for the grantor. It does not necessarily result that the grantor of the land in trust in this case is the beneficiary intended by the trust. (Dillage vs. Greenough, 45 N. Y., 438.)

Besides, Lamborn having conveyed the premises to the National Land and Improvement Company, in the absence of evidence to the contrary we must presume that he properly conveyed in accordance with the trust, and not in violation of it.

There was no evidence of fraud given upon the trial.

The request for the court to give instructions based upon the theory that there was such evidence were therefore properly refused.

The question of fact whether Cowell had accepted the deed to him, and the condition, was fairly submitted to the jury. If the jury
158 had found in favor of appellant upon the question under the instruction, the verdict would have been in his favor; but they found against him. This established the fact that he accepted the deed and the condition, and was bound by it.

Requests to instruct the jury based upon hypotheses of fact antecedent to the deed were therefore properly refused.

The appellant's counsel contend that the condition in the deed to appellant was repugnant to the estate granted by the deed, and is therefore invalid. A condition similar to that in appellant's deed was held not repugnant to the grant, and that the grantor might recover in ejectment upon proof of the breach without previous entry, demand, or notice. We assent to the doctrine and reasoning in Plumb vs. Tubs (211 N. Y., 442). See also Collins M'f'g Co. vs. Mercy (25 Conn., 242).

The exception to the instruction goes to the whole charge, and error cannot be maintained upon a part of it.

We see no error in the instruction.

Judgment affirmed.

159 (Endorsed:) 233. Cowell vs. Colorado Springs Co. Opinion. Recorded. Filed March 21, 1876. Jno. W. Webster, clerk.

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

I, John W. Webster, clerk of the supreme court of the Territory of Colorado, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and

opinion filed, in the cause herein mentioned, as the same now appears remaining in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of Colorado, at Denver, this 31st day of July, A. D. 1876.

[SEAL.]

JNO. W. WEBSTER,
Clerk Supreme Court Colorado Territory.

160 *Clerk's fees.*

Balance clerk's fees due	$18 75
Transcript, 276 fo's @ 20	55 20
Certificate & seal	1 00
Total	$74 95

Received payment of above in full, of Geo. W. Miller, attorney for pl'ff in error.

JNO. W. WEBSTER,
Clerk Supreme Court.

(Indorsed:) David A. Cowell, plaintiff in error, vs. The Colorado Springs Company, defendant in error. Error to supreme court Colorado Territory.

(Indorsement on cover:) No. 266. David A. Cowell, plaintiff ir error, vs. The Colorado Springs Company. Colorado Terr'y sup. c't. Filed 16th October, 1876.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, A. D. 1876.

DAVID A. COWELL, Plaintiff in Error,

vs.

COLORADO SPRINGS COMPANY, Defendant in Error.

Error to the Supreme Court of Colorado Territory.

ASSIGNMENT OF ERRORS.

And now comes the plaintiff in error by H. C. Alleman, his attorney, and says that in the record and proceedings of the said cause there is manifest error in this to wit:

1st. The said Supreme Court of the Territory of Colorado erred in affirming the judgment of the said District Court of the Third Judicial District of the Territory of Colorado in overruling the motion of the said plaintiff in error (the defendant in said District Court) for a new trial.

2d. Said Supreme Court of the Territory of Colorado erred in affirming the judgment of said District Court in overruling the motion in arrest of judgment in said cause.

3rd. The verdict of the jury in said District Court is against the evidence, is informal and insufficient in that it does not find the issues joined, and does not specify or state the estate to which the defendant in error was entitled as required by law and does not find the issues as to both defendants, and does not specify either of the different premises described in the several counts of the declaration in said cause, and the said Supreme Court of Colorado Territory erred in rendering judgment affirming the ruling of said District Court as to the sufficiency of such verdict.

4th. Said Supreme Court of Colorado Territory erred in rendering judgment affirming the judgment of said District Court in which judgment was entered for the premises described in the first count of the declaration, and not for those described in the second or in both counts of the declaration in this cause, the premises described in such several counts being different.

5th. Said Supreme Court of Colorado Territory, erred in affirming the judgment of said District Court, in admitting in evidence and in overruling the objections of the plaintiff in error on the trial below to the copy of the patent, from the goverment of the United States, to Charles B. Lamborn, trustee, for among other, the following land, (being all that is described in the section in which the land in controversy is situated.)to-wit: E. 1-2 of N. E. 1-4, and S. 1-2 N. W. 1-4 and N. 1-2 S. W. 1-4 of section 18, Township 14 S. R. 66 West, district of lands subject to entry at Denver Colorado, and reciting "that full payment had been made, by the said Charles B. Lamborn, trustee, according to the provisions of the act of Congress, 24th. of April, 1870, entitled "an act making provisions for the sale of public lands," and signed by U. S. Grant, President, by S. A. Fisk, Secretary, and countersigned by M. Granger, Recorder General Land Office.

6th. Said Supreme Court of Colorado Territory, erred in affirming the judgment of said District Court, in admitting in evidence and in overruling the objections of the plaintiff in error to the copy of the deed from Charles B. Lamborn trustee, to the National Land and Improvement Company, dated the 13th day of March, 1872, and conveying among other, the following land (being all of the land described in section 18, in which the lot in controversy is situated) to-wit: "E. 1-2 and S. W. 1-4 of N. W. 1-4 and S. W. of sec. 18 * * * * * * all in Township 14, S. R. 66 West." acknowledged before A. H. Califf, Commissioner of Deeds

for Colorado, who certifies: "that before me the undersigned, a Commissioner" etc., "personally appeared, Charles B. Lamborn, trustee, to me personally known to be the identical person named in, and who executed the foregoing instrument of writing, and he, in due form of law acknowledged that he signed, sealed and delivered, the said instrument as his free and voluntary act and deed, as trustee, for the uses and purposes therein set forth.

7th. Said Supreme Court of Colorado Territory, erred in affirming the judgment of said District Court, in receiving in evidence the copy of the deed from the National Land and Improvement Company, to the Colorado Springs Company, and in overruling the objections of the plaintiff in error thereto, which said deed bears date the 14th. day of March, 1872, and purports to convey among other, the following land, (being all described or embraced in section 18, in which is situated the lot in controversy, to-wit: "the E. 1-2 and S. W. 1-4 of the N. W. 1-4 and S. W. 1-4 of section 18 * * * * * * all in Township 14, S. R. 66, West;" signed by Robert B. Lamborn, Prest, N. L. & I. Co., and attested by M. L. DeCoursy, Assistant Secretary; acknowledged before Charles I. Hinchman, Commissioner of deeds etc., who certifies, that: "personally appeared Robert B. Lamborn, President, and M. L. DeCoursey, Secretary of the National Land and Improvement Company, to me personally known to be the identical persons named in, and who executed the annexed instrument, and they, in due form of law, severally acknowledged that they signed, sealed and delivered the said instrument, as their free and voluntary act and deed, for the uses and purposes therein set forth."

8th. The said Supreme Court of Colorado Territory erred in affirming the judgment of the said District Court in admitting in evidence the copy of the deed from the Colorado Springs Company, the defendant in error, to David A. Cowell the plaintiff in error, and in overruling the objections of the plaintiff in error to the same which said copy of said deed is in the words and figures following to wit: "This indenture made this twentieth day of May in the year of our Lord one thousand eight hundred and seventy-three, between the Colorado Springs Company, a corporation duly created under the laws of the Territory of Colorado, party of the first part, and David A. Cowell party of the second part witnesseth, that the said party of the first part for and in consideration of the sum of two hundred and fifty dollars to it in hand paid by the said party of the second part, *and also for the further consideration of the agreement between the parties hereto, for themselves, their heirs, successors and legal representatives, that*

intoxicating liquors shall never be manufactured, sold or otherwise disposed of as a beverage in any place of public resort in, or upon the premises hereby granted, or any part thereof; and it is herein and hereby expressly reserved by the said party of the first part that in case any of the above conditions concerning intoxicating liquors are broken by the said party of the second part, his assigns or legal representatives, then this deed shall become null and void, and all right title and interest of, in and to the premises hereby conveyed shall revert to the party of the first part, its successors and assigns, and the said party of the second part by accepting this deed for himself, his heirs, executors. administrators and assigns consents and agrees to the reservations and conditions aforesaid; and also in consideration that the said party of the second part shall never present or prosecute any claims for damages done by any irrigating canal which passes through or may pass through the land described in this conveyance against the said party of the first part, has granted, bargained and sold, and by these presents does grant, bargain, sell and convey unto the said party of the second part his heirs, and assigns the following described lands and premises in the town of Colorado Springs, County of El Paso and Territory of Colorado, viz: Lot No. one (1) in block ninety-two (92), and lot No. twenty-one (21) in block eighty-three (83); also the said party of the first part by these presents does grant, bargain, sell and convey unto said party of the second part the right to water from the irrigating canals of the said party of the first part for the purpose of irrigating the lands and premises herein before described and for household uses subject to such rules and regulations as may be prescribed by the said party of the first part, and also subject to all assessments for the necessary enlargement and repairs, and the necessary expense for the superintendence of the canals from which water is received by the said party of the second part. To have and to hold the same with all the privileges and appurtenances and all the estate, right, title and interest of the said party of the first part, either in law or equity, to the only proper use and benefit of the said party of the second part his heirs and assigns, subject nevertheless to the conditions and reservations herein above named and set forth according to the true intent and meaning thereof. And the said party of the first part further covenants with the said party of the second part that at the time of the ensealing and delivery of these presents it is well seized of the premises above conveyed as of good, sure, perfect, absolute and indefeasable estate of inheritance, in law, in fee simple and has good right, full power and lawful authority to grant, bargain, sell

and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and incumbrances of what kind, and nature soever. *And the above bargained premises in the quiet and peaceabbe possession of the said party of the second part, his heirs and assigns against all and every person lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.* In witness whereof the said party of the first part hath herewith affixed the corporate seal and caused the same to be attested by the signature of its President and Secretary the day and year first above written."

"WM. J. PALMER, President,"

"Attest. M. L. DECOURSY, Assistant Secrertay."

SEAL

"Territory of Colorado, }
County of El Paso. }

Be it remembered that on this 20th day of May, A. D. 1873, before me the undersigned, a notary public, in and for said county in the territory aforesaid, duly commissioned and qualified under the laws of said territory to take acknowledgments of deeds etc., personally appeared William J. Palmer, President of the Colorado Springs Company, and M. L. DeCoursy, Assistant Secretary of said Company, to me personally known to be the identical persons named in, and who executed the within and foregoing deed, and they in due form of law, severally acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, and deed for the uses and purposes therein set forth.

"In witness whereof I have hereunto set my hand and fixed my official seal at Colorado Springs, the day and year aforesaid."

SEAL

MATT FRANCE,
Notary Public

9th. The said supreme court of the Territory of Colorado erred in affirming the judgment of said district court in refusing to give to the jury on the trial of said case the following instruction prayed by the defendant below, plaintiff in error here, to-wit:

"The court instructs the jury that the evidence does not support the declaration and that they will find for the defendant."

10th. The said supreme court of the Territory of Colorado erred in affirming the judgment of said district court in refusing to instruct the jury that: "If David A. Cowell was in the actual possession of the premises described in the declaration and was building a house thereon prior to and at the time of the acknowledg-

ment of the deeds by Charles B. Lamborn, trustee, and Robert H. Lamborn, president of the National Land Improvement Co. offered in evidence by plaintiff, under a prior purchase from the Fountain Colony of Colorado, Cowell's possession as aforesaid was notice of his rights and nothing contained in said deeds could defeat the rights of Cowell previously acquired and the plaintiff cannot recover title derived through said deed."

11th. The said Supreme Court of the Territory of Colorado erred in sustaining the ruling and judgment of said District Court, in refusing to give the following instruction to the jury, on the trial of said cause, to-wit: "If the jury believe from the evidence, that on the 5th day of April, and the 15th day of May, 1872, the Fountain Colony of Colorado, were selling lots in the town of Colorado Springs, issuing certificates of location, putting parties into possession, receiving their money, and inducing them to erect buildings thereon, and that Cowell, as others so purchased the premises described in the declaration, and had improved and occupied the same under the purchase aforesaid as a place of business, and a home for himself and family, from that date to the present, they will find for the defendants."

12th. The said Supreme Court of Colorado Territory, erred in affirming the judgment of the said District Court below, in refusing to instruct the jury, as follows, to-wit: "If the jury believe from the evidence that Cowell purchased, and entered into possession of the premises, described in the declaration, in good faith, understanding that the only conditions were the payment of money and the erection of certain improvements; and he paid the money and made the improvements according to contract; no condition put into the deed executed from the plaintiff to Cowell, without Cowell's consent, could defeat Cowell's right, and entitle the plaintiff to recover in this action."

13th. The said Supreme Court of Colorado, Territory erred in sustaining the judgment of said District Court, in refusing to give the following instruction to the jury at the trial below, to-wit: "If the defendant, Cowell, has occupied the premises as a home and place of business, continuously from 1872 up to this time, and erected improvements thereon of great value, this is *prima facie* evidence of title in fee in defendant, and to entitle plaintiff to recover it, must show a perfect title in itself unless the defendant's possession was acquired from plaintiff."

14th. Said Supreme Court of Colorado, Territory erred in affirming the judgment of said District Court in refusing to instruct the jury that: "If the jury believe from the evidence, that

the plaintiff by its authorized agent, sold the premises described in the declaration to the defendant, on condition that if he would improve the same, and pay so much money, he should have a deed, and that defendant performed his part of the contract, and plaintiff accepted the purchase money, Cowell was entitled to a deed according to the contract under which he purchased and took possession."

15th. Said Supreme Court of Colorado Territory erred in affirming the judgment of said district court, in refusing to instruct the jury that: "If the jury believe from the evidence that W. E. Pabor was an officer of the Colorado Springs Company, and acting by the authority of the company in contracting lots to individuals, and so authorized and acting, contracted with the defendant, plaintiff is bound by the contract."

16th. The said Supreme Court of the Territory of Colorado erred in affirming the judgment of said District Court, in refusing to give the following instructions to-wit: "If the jury believe from the evidence that the plaintiff, through its authorized agent, contracted for the premises described in the declaration to defendant, and put him into possession under a promise that he should have a deed on making improvements, and paying money, without saying anything about a clause of forfeiture, and that defendant made the improvements and paid the money according to contract, and plaintiff received it, and without the knowledge or consent of the defendant, inserted a clause of forfeiture in the deed, such insertion was in fraud of the rights of the defendant, and plaintiff cannot recover.

17th. Said Supreme Court of Colorado Territory erred in affirming the judgment of said District Court, in refusing to give the following instruction to-wit: "The word deed means a deed without a forfeiting clause."

18. The said Supreme Court of Colorado Territory erred in affirming the judgment of a said District Court in giving to the jury the following instructions on the trial below, to-wit:

"The patent from the Government and the several conveyances from Lamborn and the National Land and Improvement Company are sufficient to vest in the plaintiff a title in fee to the premises therein described."

19. Said Supreme Court of Colorado Territory erred in affirming the judgment of said District Court in giving to the jury the following instruction, to-wit:

"If the defendant Cowell accepted the deed given in evidence in which the plaintiff appears as grantor, he is bound by the conditions therein expressed, and if thereafter and before the com-

mencement of this suit he opened a public resort upon the premises therein described, and there sold intoxicating liquors as a beverage; the deed thereby became inoperative and the title to the premises in controversy reverted to the plaintiff. If the facts are as above supposed, the plaintiff may recover."

20. Said Supreme Court of Colorado Territory erred in affirming the judgment of said District Court in giving the following instruction to the jury, to-wit:

"Whether the conveyance to Cowell was fraudulently imposed upon him or the condition in respect to the sale of intoxicating liquors inserted therein in fraud of his rights is not a question for your consideration, as there is nothing in the evidence presenting that question."

21. Said Supreme Court of Colorado Territory erred in affirming the judgment of said District Court in giving the following instruction to the jury, to-wit:

"No title is shown in McDowell, and his rights are subject to the rule above laid down."

22. Said Supreme Court of Colorado Territory erred in affirming the judgment of said District Court in giving the following instruction to the jury, to-wit: "If you find for the plaintiff your verdict should be: We find the defendant guilty and that the plaintiff is the owner in fee of the premises described in the declaration. If you find for defendants your verdict should be: We the jury find the defendants not guilty.

23. Said Supreme Court erred in affirming the judgment of said District Court below in refusing to strike out the evidence of the witness E. C. Kimball as to the sale of intoxicating liquors on the premises in controversy.

Wherefore the said plaintiff in error prays that the judgment in said cause for the errors above assigned may be reversed and the case remanded pursuant to law.

H. C. ALLEMAN,
Att'y for Plaintiff in Error.

STATEMENT OF CAUSE.

This cause is an action of ejectment, tried in the District Court, Third Judicial district, Colorado Territory, in and for Pueblo County, on a change of venue, from El Paso County.

PLEADINGS.

Plaintiff declares in an action of ejectment, 1st count—"For that heretofore to-wit: on the first day of October, A. D. 1873, the plaintiff was possessed of certain premises, situated in the town of Colorado Springs, county of El Paso, said Territory described as follows: *All that part of lot number one* (1), *in block number ninety-two* (92), *town of Colorado Springs aforesaid commencing at a point at the corner of Pike's Peak Avenue, and Tejon Streets, running thence South on the East side of Tejon Street, one hundred and five* (105) *feet, thence East twenty-four* (24) *feet, thence North one hundred and five* (105) *feet, and thence West twenty-four* (24) *feet, to the place of beginning*, which said premises are now occupied by a certain house, known as Johnnie's Billiard Parlor, a bar-room and other apartments, buildings and improvements, and being so possessed thereof, the defendant afterwards to-wit: on the 6th of October, A. D. 1873, entered into such premises, and that they unlawfully withhold from the plaintiff the possession thereof, *and the said plaintiff avers that it claims title to said premises in fee simple, wherefore etc.*"

2d count: "Also for that heretofore, to-wit: on the 1st day October, 1873, the said plaintiff was possessed of a certain other premises, situated in El Paso County aforesaid, in the Territory of Colorado and described as follows to-wit: lot number one (1), in block number ninety-two (92), town of Colorado Springs aforesaid, or so much thereof as is occupied by a certain house known as the Johnnie's Billiard Parlor. a bar-room and other appurtenances, buildings and improvements on said premises, and being so possessed thereof, the defendants afterwards, to-wit: on the 6th day of October, 1873, entered such possessions and unlawfully

withhold from the plaintiff the possession thereof; and the plaintiff says it claims title to said premises in fee simple wherefore it claims damages etc.

Defendants filed plea of general issue, not guilty.

TRIAL, EVIDENCE AND EXCEPTIONS.

At the trial the plaintiff below, offered in evidence the patent and the several deeds mentioned in the 5th, 6th, 7th, and 8th assignments of error, and the several objections were made and exceptions taken as shown in the bill of exceptions.

E. S. Nettleton was then sworn for plaintiff below, and testified among other things, to laying off and plotting the town site of Colorado Springs; lot one (1) block ninety-two (92), he says is in N. W. 1-4 of section 18, Township 14, S. R. 66 West—is located in S. 1-2 of N. W. 1-4 of said section 18.

George Sommers was sworn for plaintiff below, and testified that lot 1, block 92, was in the S. E. 1-4 of N. W. 1-4, of section 18. Township 14, S. R.66 W.

M. L. De Coursey sworn for plaintiff and testifies to the delivery of the deed.

J. M. Bolton, George Trimble, A. M. Shepherd, F. Williams and E. C. Kimball were then sworn for plaintiff below and testified to various sales of liquors on the premises in question. Defendant then moved to strike out the testimony of the witness Kimball, as to the sale of liquors upon the premises; motion overruled and defendant excepted. Plaintiff rested its case and the defendant then moved the court to non suit the plaintiff, for the reason that it had produced no sufficient evidence to sustain a verdict; motion overruled and defendant excepted.

Defendant then introduced E. C. Kimball, by whom it was proved that he, K. located lots in April 1872, and that a certificate of the location was given him by one Pabor. Thinks Cowell arrived in May preceding October 1872, that he took possession of and located lots.

D. A. Cowell, defendant below, then sworn for defendant and testified, that he purchased the lot of the Fountain Colony. Certificate bore Pabor's signature, that he came to Colorado with the certificate the last of April 1872. He then received another certificate by which he could locate two lots by paying $50. more. Pabor said he would have to improve the lots, and by paying the additional amount he could get a deed. He located the lots at that time. Pabor signed the location, endorsed on certificate and told witness that was the manner of location, and that he was to improve satisfactorily in four months and to pay more money

when he got a deed. He gave DeCoursy money and he gave him deed. He borrowed the money from a real estate man on the deed; did not see it for a year afterward. He improved to the amount of $2,000. There was a ball alley there in October 1873. He opened in October 1873. When DeCoursy handed him the deed he said nothing about the conditions. Discovered the covenant after he had received the deed. Defendant then offered two certificates of membership issued to David A. Cowell by W. E. Pabor. Secretary of the Fountain Colony of Colorado, one certifying he had paid in the sum of $50., and was entitled to the rights and privileges of membership and dated April 6th, 1872, and the other certifying he was entitled to membership having paid into the treasury $100, dated May 15th, 1872, and issued in lieu of the first certificate which had been taken up. On the last certificate was endorsed as located, Lot 1 block 92, lot 21 block 83, May 15th, by W. E. Pabor. The court below gave and refused the several instructions as above set forth and exceptions were taken as well to the giving of those given as the refusal to give those denied as set forth in the bill of exceptions.

The verdict found the "defendant" guilty and that the plaintiff was entitled to the premises described in the delaration in fee simple. Defendants filed a motion for a new trial which was overruled and also a motion in arrest of judgment which was overruled, to the overruling of both of which they excepted. In the supreme court of Colorado Territory the judgment of the district court was affirmed and the case is brought here on a writ of error.

No. 572

DAVID A. COWELL, Plaintiff in Error.
vs.
COLORADO SPRINGS COMPANY, Defendant in Error.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, A. D. 1876.

Brief of Plaintiff in Error.

I.

The principal question raised in this cause and to be decided is the effect of the condition or covenant against the sale on the premises conveyed of liquor, contained in the deed from the Colorado Springs Company, defendant in error, to Cowell plaintiff in error, and whether admitting that the covenants had in that respect been broken the estate of Cowell in the premises conveyed would be defeated and the plaintiff entitled to mantain this action of ejectment. This question is presented by the instruction embraced in the 19th assignment of errors, the objections to the introduction of the deed in question and the motion to strike out the testimony as to the sale of liquor on the premises, and the overruling of the motion for a non suit as well as by the instruction embraced in the 9th assignment of error. All of which, and especially the instruction embraced in the 19th assignment present the question as to the effect of the clause in the deed there referred to. At the time of the institution of this suit and the trial and determination of it, it will be observed that the distinction between law and equity preceedings then existed in this, then territory, and the common law practice was then in full force, The action of ejectment therefore could only be mantained on a legal title.

Revised Statutes of Colorado Territory 1868. Chapter 27 pages 272 and 273.

And in the consideration of the question of the construction of the clause in the deed from defendant in error to plaintiff in error, prohibiting the sale or manufacture of liquor on the premises in question arises, the questions as to whether the clause alluded to is to be construed as a covenant or a condition, and if a condition, whether void or valid, and if valid, whether precedent or subsequent, and if subsequent, whether the estate was defeated or avoided without entry, and whether on failure to enter the plaintiff below, the defendant in error here, can mantain the action of ejectment. and the plaintiff in error insists:

1st. That assuming the clause to be a condition it must be construed as a condition subsequent. The words of the deed import a present grant and the intention of the parties as gathered from the instrument was undoubtedly to pass a present title subject only, to be defeated, if at all, by a failure to observe the covenant as to the sale of liquor. If it appear to be the intent of the parties to pass a present title, or if the act or condition required do not necessarily precede the vesting of the estate, or if that act may be done as well after as before the vesting of the estate, or if from the nature of the act required and the time required for its performance, it is evidently the intention of the parties that the estate shall vest and the grantor perform the act afterward, the condition is subsequent.

1st Washburn on Real Property 2 Ed. page 469, *447.

But it is considered unnecessary to cite further authority, in fact any at all, as upon slight reflection it must clearly appear that all negative covenants or conditions or such as do not require anything affirmatively to be done by the grantee, but simply prohibit a thing indefinitely as to time, as here, must of necessity be subsequent otherwise the estate would never vest at all, for there would be no end to the time when the prohibition would exist or cease to be in force if binding at all.

2. The condition is void being repugnant to the grant in fee simple. The conveyance of an estate in fee simple imports absolute ownership in the grantee and any restriction or condition imposed inconsistent with or repugnant to the estate so granted is void.

Godberry vs. Shepherd, 27 Miss. R. 205.
Coke upon Littleton vol. 2, page 223 b., 1st Amr. Ed.
Bacon's Abgt. vol 2, page 301 L.
4 Kent's Commentaries 131, 132.
Bank vs. Davis 21 Pickering R. 42.
DePeyster vs. Michael 6 N. Y. R. 468. 595
Taylor vs. Mason, 5 U. S. Sup. Ct. Cond. R. ~~468~~, see 604.

Greenleaf's Cruise on Real Property vol. 1, 470—471.
Bradley vs. Piexoto 3 Vesey R. 326.
Newkirk vs. Newkirk 2 Cains R. 345.

And this rule as to repugnancy is not alone applicable to conveyances but prevails as to every species of contract and as to wills as well as all other written instruments. When effect cannot be given to two inconsistent provisions or clauses then one or both must of necessity fall.

While conditions in restraint of alienation are generally held void we are aware that there are authorities supporting conditions in restraint of alienation to particular persons and conditions likewise in restraint of certain uses to be made of the property as here, but it is difficult to understand since the grant of an estate in fee simple imports and carries with it as well the right to alien at will as to use it for whatsoever lawful purpose the grantee may choose how a special, particular or limited restraint upon alienation or the right to use or the lawful purpose for which an estate shall be used can be supported any more than a general restraint on such alienation or use, since a condition imposing a general restraint either on alienation or the uses of an estate would be declared void as repugnant to the grant in fee simple. He who owns an estate in fee simple absolute may use it for any lawful purpose at his will and so he may alien at will. Any limited restriction therefore upon either is equally repugnant, if not to that extent, or wholly so, certainly so in point of fact and since the reason goes that it is solely on the ground of repugnancy, that the two things are inconsistent and cannot exist or stand together and one of the inconsistent or repugnant clauses must fall there would seem to be no reason for sustaining the one and holding the other void since a limited restraint is repugnant as well as a general one, differing only in extent or degree. If a man has an estate on condition that he do not use it for some lawful purpose, or that he do not alien to some particular person, he certainly has not a fee simple, but only a restricted or limited fee or estate, something inherent in or incident to a fee simple absolute, still remaining in the grantor viz: the unrestrained right to use or alien in the particular way prohibited or generally. It is inconsistent to say that A has a fee simple, an absolute estate, and B the only right to use it in a certain way; and it is equally inconsistent as well as inconvenient to separate the title and its different present uses and right to use and control the thing granted. The deed in question purports to convey an estate, in fee simple, and that the grantee "was to have and to hold the same, with all the rights and privileges and appurte-

nances, and all the estate, right, title and interest of the said first party either in law or equity, to the only proper use and benefit of the party of the second part, his heirs and assigns forever etc.," and warrants and assures the same to the grantee, against the claims of all persons whatsoever, itself of course included. What interest then consistent with this grant was left in the grantor. In such cases the title may well be held to have passed absolutely, the condition being a personal covenant reserved to the grantor, and as such covenant, and only as such, being capable of being enforced, but not by way of enforcing a forfeiture of the land. "A deed may be made up of several provisions; of an assignment of an estate in land, which is a contract executed, of a condition or provision which may also be a contract executed, but which grants an easement in favor of other lands, and of an agreement which is merely a personal obligation, and is therefore an executory contract. All these different provisions of the same instrument are separate and independent contracts as much so as though contained in different instruments." The holding of such a clause as the one in question, to be a condition capable of being enforced as such is " a failure to perceive the distinct and separate character of the different contracts, and to give each its proper construction, and regarding them only as blended in one contract."

Bingham on Sales of Real Property, 44, see also 41, 42, 43.

Here the provision of the deed assigning the real estate was a contract executed, that forbiding the sale of liquor, a contract executory, and the fee to the premises having passed to the grantee it could only be enforced as a personal covenant.

In the following case where land was conveyed with condition subsequent, the court held the condition to be capable of being enforced only as a covenant, and say with regard to the condition: "Was the writing between Culbertson and wife and Charles Wharton Sr., by his attorney, an executed or executory contract on the part of the former. It will scarcely be doubted that such may be the case as to one party, and not as to the other, the effect of which would in general, in case of a sale of real estate, be to turn the vendor round to his covenants to enforce performance of anything remaining to be done by the grantee. He could not use his title to enforce conditions, for that would be gone by the conveyance. This is plain."

Garver *et al* vs. McNulty *et al* 39 Pa. St. R. 473.

"There is a diversity between inheritances executed and inheritances executory, as lands executed by livery cannot by indenture of defeasance be defeated afterward."

Coke Upon Littleton, 1st American Edition, V. 2, page 236.

If then the contract so far as the part concerning the conveyance and assignment of the land is concerned was executed, the fee simple passed absolutely and was not divested by the condition or clause of defeasance and this clause can only be enforced as a covenant.

3d. The clause in question must be construed as a covenant since no right of re-entry for condition broken is reserved. In all such cases it will be construed as a covenant and not as a condition, since the grantor in such case has no right of re-entry and without re-entry, the estate will not be divested, nor can the grantor take advantage of or enforce the condition as such. Therefore in such case the action of ejectment cannot be maintained.

Rogers vs. Pitcher, 6 Taunton R. 202.

Washburn on Real Property, V. 1, 318, *320, 2d Edition.

Platt on Covenants 424, (3d Law Library 189).

Den vs. Post, 1st Dutcher, (25 N. J. R.) 292.

Wheeler vs. Danscomb, 3 Cushing, R 285.

Wilson, et al. vs. Phillips 2 Bingham R 13.

Coke Upon Littleton, 1st American Edition, V. 2, 204a, 204b.

Spear vs. Fuller, 8 N. H. R. 174.

DeLancey vs. Ganong, 5 Selden R. (9 N. Y. R.) 9, see 20.

Dennison vs. Reed, 3 Dana R. 586.

If it be doubtful whether it be a condition or a covenant it will be construed as the latter.

4. Kent's Commentaries, 132.

From the nature of things it would seem that since the right of re-entry must be reserved otherwise it will not exist and since it must be made in order to avoid the estate granted that in all cases where the right did not exist or was not reserved in the deed, clauses in deeds like the one in question could only be enforced as covenants In all of the cases likely to be cited for the defendant in error in regard to conditions, it will be seen the right of re-entry is reserved in the deed, and when they contain covenants of warranty, non-claim or quiet enjoyment, it is expressly stated that it is subject to such conditions, and in that respect they are different from the deed in controversy. If there is a doubt or repugnancy, the grant must be construed most strongly against the grantor.

Bacons Abridgement, V. 4, page 526.

4th. But even assuming that the clause in controversy is a condition capable of being enforced and that the right of re-entry

existed nevertheless, since no re-entry was in fact made or proved at the trial nor even any demand for possession of the premises made or notice to quit given, nor any other act done or step taken prior to the institution of this suit taking advantage of the condition the estate was not determined, and the plaintiff in error was possessed of the legal ti e to, and fee simple in the lands in controversy, and this suit ust fail. A formal re-entry is in all cases necessary to take advantage of a condition broken and to avoid the estate, and unless it be made the action of ejectment cannot be maintained for the fee in such case still remains in the grantee. "Regularly, when a man if he will take advantage of a condition if he may enter he must enter, and when he cannot enter he must make a claim and the reason for it is that a freehold or inheritance shall not cease without entry or claim, and also the feffor or grantor may waive the condition at pleasure."

Coke Upon Littleton, 1st American Edition, volume 2, 218a, 218b.

"A condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. Notwithstanding its breach, the estate, if a freehold, can only be defeated by an entry made, and until that is done it loses none of its original quality or incidents."

Washburn on Real Property, V. 1, 473, *450—451.

"Estates of freehold could not begin at common law without livery of seizen, or be determined without an actual entry to regain that possession which the livery had transfered."

Smith's Leading Cases, V. 1, part 1, 107, *97. Wallace and Hare's notes to Dumpor's case, and authorities there cited.

"If this condition subsequent were broken, only the person to whom the lands are devised over can by an entry take advantage of it."

Webster vs. Cooper, 14 Howard (U. S.) 488, see 501.
See also Marwick vs. Andrews, 25 Maine, R. 525.
Bowen vs. Bowen, 18 Conn., R. 535.
Chalker vs. Chalker, 1 Conn., R. 79.
Holly vs. Brown, 14 Conn., R. 255.
Willard vs. Olcott, 2 N. H. R. 120.
Jewett vs. Berry, 20 N. H. R. 36.
Spear vs. Fuller, 8 N. H. R. 174.
Cross et al. vs. Carson, 8 Blackford, R. 138.
Thompson vs. Thompson, 9 Ind., R. 323.
Ludlow vs. N. Y. & Harlem R. R. Co., 12 Barber 440.
Hamilton vs. Elliott, 5 Sargent and Rawle, R. 375.

Phelps vs. Chesson, 12 Iredell, R. 194.
Stone vs. Ellis et al., 9 Cushing, R. 95.
Nicoll vs. N. Y. & Erie R. R. Co., 12 N. Y. R. (2d Kernan) 121,
Chicago, B. & Q. R. R. Co. vs. Knox College, 34 Ills., R. 195.
Bacon's Abg't. volume 2, page 312.
Greenleaf's Cruise on Real Property, V. 1, page 504.
Adams on Ejectment 143, 144 and notes.

It is proper to observe that there are some decisions under the old practice and where the consent rule and the fiction of lease, entry and ouster prevailed to the effect that no actual entry was necessary, but they go upon the principle that an entry was confessed by the lease entry and ouster which the defendant was obliged to confess before appearance and plea, hence it was not only not necessary to prove an entry, but it could not be controverted or disproved. But where this fiction is abolished as here (Rev. Stat. Col. 1868, sec. 6, page 274,) and no longer prevails the proof of an actual entry is necessary. Such is the ruling under similar statutes in Indiana, Massachusetts, Connecticut Illinois, Maine and New Hampshire. Since the demandant, therefore, to en title itself to possessson must show an actual entry in the case of a condition broken in order to avoid the estate and re-invest itself with the title and since it can only recover according to its rights existing at the time of the institution of the suit, and upon a title then conferring upon it the right to the immediate possession, this action can in no wise be maintained without such actual re-entry prior to the institution of the suit. Although a title in fee may exist in the demandant at the time of the institution of the suit, nevertheless unless he have a right to the immediate possession, no action of ejectment can be maintained.

City of Cincinnati vs. The Lessee of White, 6 Peters 431.

But here although the right of entry may have existed, yet it was optional with the grantor whether it would enter or not and until such entry the estate was not divested or the grantor or demandant seized in fee or entitled to possession at the time of the institution of the suit although an actual right of re-entry might theretofore have existed since only by an actual entry is the estate avoided or the fee simple re-invested in the grantor and prior to such actual entry the grantee even after condition broken is seized of the same estate as first granted

5. It will also be observed that the deed in question contains full covenants of warranty and in the concluding clause warrants and assures the land to the grantee not subject to any condition or reservation but generally against the claims of all and every per-

son or persons whatsoever, itself included. It may well be questioned therefore if it is not in view of this covenant estopped from forever after setting up or asserting any title to the premises so conveyed. Where a grantee was incapable of taking the fee and the deed was held void nevertheless the grantor was estopped from setting up a title to the estate granted.

Mason vs. Munchester 9 Wheaton 445, 5 Cond. 644.

If the grant has become void for condition broken, it has then only the same effect as one void *ab initio*, for until the estate is divested or menaced the covenants are alike silent and ineffectual in law, and since in the last case the grantor will be estopped by such a covenant from asserting a claim to the premises, so he likewise will be after avoidance of the deed by entry for condition broken, in fact he would be estopped from making such an entry. If it be said that such a covenant in a case like this cannot have such force and effect consistent with the other covenants or conditions, then we assert that the assumed condition or restrictive clause must be construed as a covenant and not as a condition since the whole must be taken together and such a construction be given it as will if possible give force and effect to each and every part. By construing the restrictive clause as to the sale of liquors as a covenant and not as a condition it can stand and be enforced as such, while the clause of warranty will be equally effective as in such case the title so warranted and and assured to the grantee would not by a breach of such covenant become forfeited, and the grantor privliged to assert its title contrary to its warranty, but the covenant in such a case could be enforced personally against the grantee by action for damages or suit in equity to restrain the use of the land contrary to such covenants.

That it is the duty of the court to so construe the instrument as to give effect to the whole and to each and every of its parts is not to be doubted, and that the clause in controversy cannot be construed as a condition consistent with the failure to reserve a right of re-entry and the covenants of warranty inserted and the whole made to have force and effect would seem equally plain. The restrictive clause therefore as to the sale of liquor must be construed as a covenant since the grantor cannot re-enter and since it is plainly apparent from such failure to reserve the right to re-enter and the insertion of covenants of warranty, it was never intended by the grantor that the estate should be defeated or avoided for the breach of any such restrictive covenants. In such case the grantor is not re-

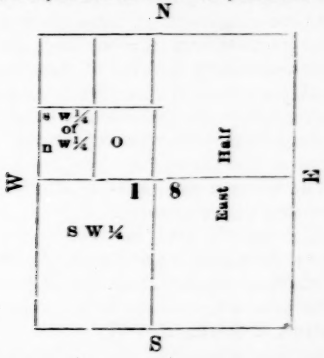
possessed nor subject to be re-possessed of the legal title, and this action cannot be maintained. The plain understanding to be gathered from the instrument is that the grantee is to take a fee simple absolute which was warranted and assured to him against the claims of every person, and not subject to forfeiture, but that by accepting the deed he consented to the covenants forbidding the use of the land for certain purposes, which became a pesonal covenant. As has been observed above these several points are raised and presented by the instruction embraced in the 19th assignment of error instructing the jury that the simple acceptance of the deed by Cowell, plaintiff in error and the sale of liquors entitled the plaintiff below to recover, and by the objections to the deed, the motion to strike out the evidence of the sale of liquor, and the motion for a non-suit for want of sufficient evidence to maintain the suit &c.

II

By the instruction embraced in the 18th assignment of error the court instructed the jury that the patent from the government and the several conveyances from Lamborn and the National Land and Improvement Company are sufficient to vest in the plaintiff a title in fee to the premises therein described. The introduction of these deeds was also objected to at the trial, see 5th to 8th assignments of error. Were the conveyances mentioned sufficient to vest the fee in the plaintiff and were the copies of the same admissable in evidence. The plainiiff in error insists:

1st. That neither the deed from Lamborn to the National Land and Improvement Company, nor that from said company to the Colorado Springs Company, defendant in error mentioned, described or contained the lands in controversy. Referring to the bill of exceptions, and we find that one Nettleton who laid off and platted the lands in controversy among others as the town-site of Colorado Springs and we find that he says: "The property lot 1 in block 92 is located in the NW ¼ of section 18 T 14 R 66 W, it is located in S ½ of ¼ section of NW ¼ of section 18 T 14 R 66 W." Perfectly consistent with this is the testimony of George Sommers, also sworn as a witness by plaintiff below to identify land as it may be in the NW ¼ and S ½ thereof, and be in the SE ¼ of NW, a part of the S ½. He says: "lot one (1) in block ninety-two (92) is in the SE ¼ of the NW of section 18 T 14 R 66 W." These are all of the witnesses that were sworn and all of the testimony given to identify the premises described in the deed from the defendant in error to the plaintiff in error, which was described as a lot and identified as above as being or assumed to be in certain land

mentioned in previous deeds to the defendant in error and previous grantors and described according to government survey of sections quarters and etc., Looking 1st to the deed from Lamborn to the National Land and Improvement Company and 2nd to the deed from the National Land and Improvement Company to the Colorado Springs Company the defendant in error and we find that all of the land described in section 18 T 14 R 66 W, is as follows: "E ½ and SW ¼ of NW ¼ and SW ¼ of section 18." This is the land described in both deeds. We append the following diagram, marking the land described in the deed. To more correctly understand it let us transpose the description, and it would read: The SW 1-4 and the SW 1-4 of the NW 1-4 and the E 1-2 of section 18, or in another way: the SW 1-4 of the NW 1-4 and the E 1-2 of sec-18, &c, clearly meaning and referring to the E 1-2 of the section and not the E 1 2 of the 1-4 section, the NW 1-4. If it had been intended to describe the E 1-2 of 1 4 section, NW 1-4, the description should have run, E 1-2 of NW 1-4, and SW 1-4 of NW 1-4 &c.



The ½ of a ¼ section or 40 acre tract marked "O" is SE ¼ of the NW ¼ and that in which the witness Sommers locates the land which locates it with greater certainty than the description given by the witness, Nettleton, which is that it is in the S ½ of the NW ¼, that is in the SW of the NW or SE of NW ¼ both being included in the S ½ of the NW ¼ and we insist that the E ½ therefore refers to the E ½ of the section and not E ½ of the ¼ section. If this be true, then the land is not embraced in the deeds, hence they show no title and were immaterial and it follows that they should not have been admitted in evidence, that

the instruction referred to telling the jury that they conferred a title on the plaintiff in error was wrong and that the defendent in error not only failed to make a title, but should have been nonsuited and the motion for a new trial after yerdict been granted.

2d. It will be noticed that the officers certifying the acknowledgment of the deeds in question certify that — and — President and Secretary of the companies named appeared and acknowledged the instruments in question as "*their*" act, &c., not as the act of their constituents or the corporations which they represented. Sec. 13 of chapter 17, Rev. Stat. Col. (1868), makes this acknowledgment stand in lieu of the proof of execution of the instrument, hence if it is only acknowledged as the act of the agents who signed it and not as the act of their principal it is not proved as the act of such principal, but only as the act or signature of such agents. It must appear from the certificate of the officer that the *grantor* acknowledged the deed to be his act, otherwise it is invalid. Chapter 17, Rev. Stat. Col. (1868), is taken from Illinois, hence the construction there given to it is adopted here in Colorado, as by adopting the statute its construction is adopted and in such case being the line of decision here as to real estate will govern this court. If the officer fail to certify that the deed was acknowledged by the grantor the deed is invalid. The certificate should show that such officers for such companies acknowledged &c. and not that they acknowledged it as "their," the officers act &c. The acknowledgement or admission must be made by, or for the grantors, the companies.

Short et al. vs. Conlee, 28 Ills., R. 219.

See also Bryan vs. Ramirez, 8 California R. 461.

Hayden et al. vs. Wescott, 11 Conn. R. 129.

Pendleton vs. Button, 3 Conn., R. 406.

Stanton vs. Button, 2 Conn., R. 527.

It not appearing, therefore, that the deeds were acknowledged by the grantors named, they are invalid and passed no title and hence were inadmissible. These objections were made at the trial to the introduction of the deeds. See objections to deed of N. L. & I. Co.

3d. It will be seen that the certificate of incorporation of the Colorado Springs Company, the defendant in error, was signed and filed on the 20th of June, 1871. At that time there was in force in this Territory, Chapter 18, Revised Statutes of Colorado, (1868), which authorized the formation of corporations "for the purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business; construct wagon roads, railroads,

telegraph lines, dig ditches, flumes, run tunnels, or carry on any kind of business designed to aid in the productive interests of the country." By a reference to the act of Congress of 2d March, 1867, see statutes at large (v. 14 426), it will be seen that the legislatures the several territories were prohibited from granting private charters and were only authorized to pass general acts regulating the creating of corporations for the purposes of mining, manufacturing, or other industrial pursuits. Therefore, prior to 1870 the legislature had not authorized and was not authorized to pass any act providing for or creating a corporation like this, as it was for neither mining, manufacturing or designed to carry on any other industrial pursuit, &c. On the 11th of February, 1870, the legislature of Colorado passed an act amendatory of Chapter 18, Revised Statutes above referred to, (See acts of 1870, page 49,) authorizing the incorporation of companies for the purpose of aiding and encouraging emigration, and for that purpose to hold, acquire, possess and convey real estate, town lots, &c. It will be seen therefore that at the time of the organization and the filing of the certificate of the Springs Company in June, 1871, that although it was au-authorized by the act of the legislative assembly of 1870, that such act was in conflict with the act of Congress referred to and therefore void. Inasmuch, therefore, as this act of the legislature of 1870 was void, being in conflict with the act of Congress, the certificate or act of the persons assuming to incorporate under it was also void and there was therefore no such corporation created; hence the conveyance to it by the National Land Improvement Company was void and passed no title, as there must be a grantee as well as a grantor and land cannot be granted to a corporation which has no existence, to a mere name signifying nobody and nothing. Neither could such assumed corporation make any deed to Cowell. The fact that this would leave the title to the land in the National Land Improvement Company, in no wise helps the defendant in error as it must recover on the strength of its own title, not the weakness of its adversaries. It may be insisted that the act of Congress of the 10th of June, 1872, Vol. 17 391 statutes at large) legalizes and gives force and effect to the act of the legislature of 1870 and to the certificate of incorporation thereunder, but it is submitted that it cannot have such a retroactive effect. It might be said to give force and effect to the act of the legislature from the time of the passage of the act of Congress, but not prior to that time. The act of the legislature was absolutely void at the time of its pass-

age and at the time of incorporating under it. The crtificate was therefore void, the corporation attempted to be organized was not in fact incorporated or created and did not exist. A grant must pass the fee to some one and if it be made or purport to be made to a fictitious, assumed or mythical person it is ineffectual and so likewise to a person or corporation not then in existence and passes no title. There was no grantee in existence at the date of this deed from the National Land Improvement Company to the Colorado Springs Company to take. It will be noticed that the deed to the Colorado Springs Company is dated March 14th. 1872. The act of Congress was not passed until months afterward the 10th of June, 1872, so that however it may have effected the act of the legislature of 1870 and the certificate of incorporation thereunder it, could not give force and validity to this deed which was void at the time of making it, or create a grantee to take under it at that time. It certainly will not be pretended that the corporation could have any existence without some law creating or authorizing it, or under which it could be created and it certainly cannot be pretended that the act of the legislative assembly of 1870 was valid in view of the act of Congress of 1867, or that the deed running to a corporation which had no existence passed any title out of the grantor. The fee could not remain in abeyance. There must have been some person, natural or in law, in existence capable of taking and to take the estate assigned or passing, or to pass by the grant in existence at the time of its execution. Congress has scarcely the super-human power of creating a person (in law) capable of contracting, anti-dating its existence and making a contract for it before it ever existed or was created. To give this act of Congress such a construction is to legislate into existence, 1st. The charter, a contract between the state and corporation. 2d. The deed made to such corporation and 3d. The grantee, at the time of the deed, long prior to the act of Congress, in order that by relation it may be capable of taking long prior to the date of its creation. The act of Congress of the 10th of June, 1872, if it made valid the act of the Legislature did not and could not make valid all the void acts, grants and deeds of the corporation prior to that time, at least it should not be so construed unless the words used clearly and explicitly express such an intent. It simply undertakes to make valid certain acts of the legislatures theretofore as well as thereafter to be passed without mention as to the acts of such corporations which were theretofore without legal existence by reason of such void acts of the legislatures of the Territories. The deed inquestion therefore, was not made valid. If any question could have before existed as to the interpretation of the act of 2d March, 1867, and whether

it forbid corporations of the kind in question or not, Congress put that doubt at rest by the act of 10th of June, 1872, by expressly making valid and authorizing such corporations, since the passage of the last act indicated the construction of the first, and the necessity of the last and that corporations of that kind were within its understanding prohibited by the first otherwise the last act was unnecessary.

"Every grant must have a grantor, a grantee and a thing granted."

Chitty's Blackstone's Commentaries V. 2, 239, *296, Ed 1855.

Chase vs. Palmer, 29 Ills. R. 306.

"If a man grant his estate to an imaginary corporation which exists only in his own mind no title passes."

Russel vs. Topping 5 McLain R. 194, see 202.

5th. The N. L. and I. Co., grantor of defendant in error and under whose deed it claims to derive title is a foreign corporation created by the laws of the state of Pennsylvania. As such foreign corporation it could not acquire or hold real estate in Colorado except by comity or the permission of her laws. "A corporation can have no legal existence out of the sovereignty where it is created as it exists only in contemplation of law and by force of the law and when that law ceases to operate and is no longer obligitory the corporation can have no existence." Again: "Every power however which a corporation exercises in another state depends for its validity upon the laws of the sovereignty in which it is exercised and a corporation can make no valid contract without the sanction express or implied of such sovereignty."

Runyan vs. The Lessee of Coster et al. 14 Peters, R. 122.

"It must dwell in the place of its creation and cannot migrate to another sovereignty. The enforcement of its contracts made there depend purely on the comity of the states, a comity which is never extended when the existence of the corporation or exercise of its powers is prejudicial to their interest or repugnant to its policy."

Paul vs. Virginia, 8 Wallace R. 168.

See also the Bank of Augusta vs. Earle, 13 Peters R. 519.

The deed form the N. L. & I. Co. to the defendant in error and under which it claims to derive title, it will be seen bears date March 14th 1872, and whiile the act of Congrest March 2nd 1867 was still in force and which at that time forbade the creation of any such corporation or corporation of like powers as appears to be given to the N. L. & I. Co. No corporation could be created except for mining, manufacturing &c. or designed to carry on some branch of productive industry. Looking to the gross manner in

which the power to create corporations by private act and of the kind created as well as the power given them, had theretofore been abused in the Territorial Legislatures, and it cannot be doubted that the intent of Congress by this act was to forbid the creation of such corporations as this, as the extensive franchises theretofore granted tended to monopolize landed estates for purposes of speculation and thereby to injure the agricultural, mining and manufacturing interests of the country. Such corporations were therefore not only prohibited but the legislatures were only authorized to provide for the creation of such as were for mining, manufacturing &c. A foreign corporation could certainty claim no greater right than a domestic one, and since domestic corporations were forbidden existence for such purposes as this was created, since they could neither hold and transfer land as is provided by the charter of this or have any existance for such purporse, foreign corporations could not exercise such powers within the territorial limits of Colorado. Such acts were not only prejudicial to her interests but repugnant to both her policy and express law. It follows therefore that the deed of the N. L. & I. Co. to the defendant in error was wholly unauthorized and absolutely void, and hence passed no title to the grantee, the defendant in error, and that it failed to make title to the premises in question, that the deed should have been rejected when offered in evidence, that the instruction embraced in the 18th assignment of error was wrong, that the motion for a non-suit should have been granted and the instruction embraced in the 9th. assignment of error, and which was refused, should have been given. The act of Congress of June 10th. 1872, in no wise affects this foreign corporation, or of any act done by it as it applies in express terms only to local corporations theretofore created or thereafter to be created under the acts of the legislatures of the territories.

6th. The patent grants the land to Charles B. Lamborn, trustee. If A. conveys land to B. as trustee and no use is declared, this shall be held to be in trust for the grantor.

Law of Trust and Trustees, Tiffany and Bullard, 42 and 43 and notes.

The word trustee cannot be held to describe the person in this case as he is otherwise well described, but simply to create a trust for an undeclared use resulting to the grantor. Hence the trustee had no right to convey in such case without the consent or direction of the person for whose benefit it was held.

7th. The certificate of incorporation of the defendant in error undertakes to create a corporation for almost every purpose specified

by the statute, whether they are legal or illegal. The law authorizing by general statute the creation of corporations was never intended to authorize dual corporations; specific duties are enjoined upon and powers given to each, and specific and different things required to be specified for each, and to prevent such dual corporations which might be created by special acts, general statutes are passed. This certificate is therefore indefinite and uncertain. In undertaking to specifiy everything it particularizes nothing and is therefore void for a non compliance with the statute requiring it to specify certain and particular things, as to the objects for which it is created and etc. If the certificate is not in accordance with the law no corporation was ever created or n

See Revised Statute Col. chapter 18, page 11

8th, Certified copies of deeds were used in evidence on the affidavit that the originals were not in the party's power to produce, which was error.

Rev. Stat. Col. (1868), Chap. 17, p. 112, sec. 19.

But if such affidavit had been filed the copies would still be inadmissable. The originals were not acknowledged or proved according to law, and the copies were not entitled to be read in such case. See same Section Statue.

III

By the instruction asked and refused, and embraced in the 12th assignment of error the court was asked to charge the jury in substance that if Cowell complied with his prior contract of purchase which did not embrace the condition of forfeiture contained in the deed, the insertion of such a clause in the deed without Cowells consent could not defeat his, (Cowells,) right to the land, or entitle plaintiff to recover. That embraced in the 13th assignment is substantially the same, adding that such an insertion of the condition was in fraud of his, Cowels right. These instructions were refused and an exception taken, and the plaintiff in error insists:

1st. That as Cowel's prior contract of purchase as evidenced by the certificates and the oral evidence of the circumstances and conversations as given by himself, embraced no condition of the kind inserted in the deed, he had no right reasonably to expect the insertion of such a clause. True it is stipulated in the deed that an acceptance of the deed shall be construed as an acceptance of the condition, and such in fact would be its effect without such a clause but it appears from the testimony of Cowell which is not contradicted by any other witness, that he had no knowledge of the insertion of the condition in the deed, and did not know of it until long afterwards, that he took it and raised money on it from a real

which the power to create corporations by private act and of the kind created as well as the power given them, had theretofore been abused in the Territorial Legislatures, and it cannot be doubted that the intent of Congress by this act was to forbid the creation of such corporations as this, as the extensive franchises theretofore granted tended to monopolize landed estates for purposes of speculation and thereby to injure the agricultural, mining and manufacturing interests of the country. Such corporations were therefore not only prohibited but the legislatures were only authorized to provide for the creation of such as were for mining, manufacturing &c. A foreign corporation could certainty claim no greater right than a domestic one, and since domestic corporations were forbidden existence for such purposes as this was created, since they could neither hold and transfer land as is provided by the charter of this or have any existance for such purporse, foreign corporations could not exercise such powers within the territorial limits of Colorado. Such acts were not only prejudicial to her interests but repugnant to both her policy and express law. It follows therefore that the deed of the N. L. & I. Co. to the defendant in error was wholly unauthorized and absolutely void, and hence passed no title to the grantee, the defendant in error, and that it failed to make title to the premises in question, that the deed should have been rejected when offered in evidence, that the instruction embraced in the 18th assignment of error was wrong, that the motion for a non-suit should have been granted and the instruction embraced in the 9th. assignment of error, and which was refused, should have been given. The act of Congress of June 10th. 1872, in no wise affects this foreign corporation, or of any act done by it as it applies in express terms only to local corporations theretofore created or thereafter to be created under the acts of the legislatures of the territories.

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See Revised Statute Col. chapter 18, page 117. Civil Code Sec. 31, 36, 4

8th, Certified copies of deeds were used in evidence without an affidavit that the originals were not in the party's possession or power to produce, which was error.

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1st. That as Cowel's prior contract of purchase as evidenced by the certificates and the oral evidence of the circumstances and conversations as given by himself, embraced no condition of the kind inserted in the deed, he had no right reasonably to expect the insertion of such a clause. True it is stipulated in the deed that an acceptance of the deed shall be construed as an acceptance of the condition, and such in fact would be its effect without such a clause but it appears from the testimony of Cowell which is not contradicted by any other witness, that he had no knowledge of the insertion of the condition in the deed, and did not know of it until long afterwards, that he took it and raised money on it from a real

estate man in order to complete his purchase. Cowell was not bound to suspect the grantor of bad faith, and without the knowledge of the condition it was no acceptance.

Price vs. School Directors &c. 58 Ills. R. p. 452.

There was then no acceptance and it matters not whether the entire deed or only the condition in such case would be void since if only the condition fails of effect, the grant is effectual to pass the title absolutely to Cowell, but if both the grant and condition Cowell would still be entitled to possession under his certificate and prior purchase independant of the deed and ejectment could not in such case be maintained against him.

2nd. In this connection may be considered the instructions asked and refused and embraced in the 13th, 14th, and 15th, assignments of error, to the effect, 1st. that if the jury found that Cowell was in possession of the premises in controversy, this was *prima facia* evidence of title in fee, and that the plaintiff must in such case show title or that the defendant derived its title through it in order to recover. 2nd. That if Cowell was in possession under the purchase and had complied with the terms of the same, which did not embrace the condition in controversey, he was entitled to a deed without such a condition. 3rd. That if the jury beleived that Pabor was an officer of the Springs Company, and acted by its authority, in selling the lot in controversy, it was bound by that contract, and in connection with the other instructions above alluded to, these should have been given since they correctly state the law and were applicable to the case. If no such condition was embraced in the contract of purchase under which Cowell took possession, and occupied and improved, then it could not be forced on him, he was entitled to a deed according to his contract, and if he never voluntarily assented to or accepted such a condition, which he could not do without knowledge of it, it was not obligatory upon him and if in such case the entire deed with all its provisions fails, the right of possession under the contract or otherwise, was to be determined by the rules contended for in the last mentioned instructions.

3rd. The court instructed the jury as set forth in the 20th assignment of error, that, "whether the conveyance to Cowell was fraudulently imposed upon him, or the conditions in respect to the sale of intoxicating liquors inserted therein, in frand of his rights is not a question for your consideration, as there is nothing in the evidence presenting that question." The conclusion drawn from facts proved in a case as to the existence or non-existence of a particular fact, or as to whether a fact is or is not proved, is the prov-

ince of a jury. They may, and it is solely their province, to say what is and what is not proved, and whether the evidence does or not establish or present or tend to establish a certain fact after it has been submitted to them. The formal taking possession of a deed without the knowledge of conditions and which the grantee had no reason to believe or suspect were inserted therein, is no acceptance of its terms or conditions, as we have endeavored to show. There was proof by the witness Cowell, which was uncontroverted, that he, Cowell, the grantee, knew nothing of these conditions at the time of taking possession of the deed, that he never read it but passed it immediately to another man. He gave no assent by act as his possession had been previously acquired; the question then was presented to the jury and the instruction was wrong. Taking this instruction in connection with the one embraced in the 19th assignment of error wherein the jury are told that if Cowell accepetd the deed &c. and we have presented this propositson. 1st. The court tells the jury that if Cowell accepted the deed and 2nd. that the question of acceptance is not to be considered that then &c. the plaintiff may recover. The deed was not accepted if the condition was not, and whether it was accepted or not was a question for the jury. Every condition, clause, and covenant in a deed-poll to be obligatory on the grantee, whose assent thereto is not signified by signing as in ordinary contracts must be assented to by him from the very nature of things, otherwise there is no mutuality, no consenting of minds to the same thing or contract. The mind cannot assent to that which it does not know or understand No presumption of assent is to be raised from the fact that Cowell occupied the premises. He was already possessed and did not take possession under the deed, but held by a right acquired prior thereto. Even if otherwise it was to be established to and found by the jury.

4th. Succeeding the last mentioned two instructions the court instructed the jury as embraced in the 21st. assignment of error: "No title is shown in McDowell and his rights are suject to the rule above laid down." Whether a title was then vested in McDowell or not, was a question for the jury and it was not in the province of the court to direct the jury that any particular thing had or had not been proven by the evidence.

5th. The instruction embraced in the 22nd. assignment of error is to the effect that if the jury found for the plaintiff they would find him entitled to the premises described in the declaration in fee simple. While the court may instruct the jury as to

matters of form in their verdict it has no right to instruct them as to how they shall find matters of substance. It was necessary under the statute that the jury should specify and find the particular estate or interest in the estate in controversy to which the plaintiff if entitled at all was entitled to recover. A fair understanding of all the charge of the court taken together is that there was but one fact left to the jury to find and that was as to whether intoxicating liquors had been sold or not, although the evidence in the case presents several questions of fact. The jury were told that the deeds introduced were sufficient to prove a title in fee in the plaintiff below, that the deed in question if accepted, but whether accepted or not they were not to consider, and liquors had been sold the plaintiff should recover but not such lands and such an interest therein as the proof had established or described, but that described in the declaration and in fee simple.

IV.

The 2nd. assignment of error questions the correctness of the decision of the Supreme court in affirming the judgment of the District court in overruling the motion in arrest of judgment, and the 3rd. in sustaining the sufficiency of the verdict, and it is insisted.

1st. That the said motion in arrest of judgment should have been sustained in that no judgment could be entered on the verdict against both defendants, nor against either of the two as it was uncertain which of the two was intended, it simply finding "the defendant guilty." Where there are several defendants the verdict should be rendered against such of them as claimed title or were in possession at the time of the institution of the suit or against all.

Revised Stat. of Col. Chap. 27, sec. 20, page 276.

The greater may include the less, the plural the singular, but the reverse is not true.

2nd. The land described in the 2nd. count of the declaration is described as lot 1 in block 92 *or so much thereof* as is occupied by a certain billiard parlor &c. This is no such certain description of the premises as is required by the statute (Rev. Stat. Col. sec. 7, page 274.) nor such a description as an officer on a writ of restitution issued on a judgment on such a declaration could tell certainly into the possession of what premises he was required to put the plaintiff; whether of the whole lot *or the so much thereof* &c. He would in fact be commanded to do either the one or the other or to put him into possession of one or the other premises if the writ did as it must follow such a description. Pleading in the al-

ternative is not allowable.

1st. Chitty's Plending 237, 10th. Amr. Ed.

For this reason the judgment should have been arrested for if everything in the pleading be confessed or found no intelligible judgment could be pronounced thereon and upon which a writ of restitution could be issued to command the officer to deliver possession of any certain or particnlar premises. The jury find the plaintiff entitled to the premises described in the declaration, which includes of course the 2nd. count. Had they returned a verdict that they found the plaintiff entitled to a premises and described it as in the 2nd. count, that is to the lot *or to* so much thereof &c it would only more readily appear that they found nothing at all, and yet by adopting the description in the declaration, they render just such a finding, that is that the plaintiff is entitled to the lot *or* the so much &c. for such is the description in the 2nd. count of the declaration. With this we submit the case and respectfully ask that the judgment be reversed and the cause remanded,

H. C. ALLEMAN.

Attorney for Plaintiff in Error.

No. 562 Dec. T. 1877

IN THE

LME COURT

—OF THE—

ITED STATES.

TERM, A. D. 1878.

COWELL, Plaintiff in Error.

vs.

O SPRINGS COMPANY,
efendant in Error.

reme Court Colorado Territory.

of Errors, Brief nnd Argu-
for Plaintiff in Error.

H. C. ALLEMAN,
torney for Plaintiff in Error.

MOCRAT STEAM PRINT.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT,

DAVID A. COWELL,
Plaintiff in Error,
VS.
THE COLORADO SPRINGS COMPANY,
Defendants in Error.

NO. 266:

Brief and Reply of Plaintiff in Error,

1st The defendant in error was organized for the purpose, as disclosed in its certificate of incorporation, of buying and selling real estate, establishing colonies, cities and towns, and also as admitted by the argument and brief of defendant in error's counsel. See page 9, also certificate of incorporation. As the act of Congress of March 2d, 1867, Statute at large, vol. 14, p. 426, forbid the granting of any private charter by any territorial legislature, and only authorized the passage of general incorporation laws for the organization or creation of corporations for the purpose of mining, manufacturing or mechanical purposes, or to aid in

the productive industries of the country, and as the statutes of the territorial legislature, under which the defendant in error was organized, (R. S. Col. Ter'y .868, chap. 18,) only authorized or provided for the organization of corporations for such purposes, it was insisted by us that the defendant in error had no corporate existence, for such purpose of acquiring land for cities, colonies, etc., at least, that it was therefore incapable of taking as grantee under the deed to it from the National Land and Improvement Company, its grantor, and no title passed to it, hence the action of ejectment could not be maintained. Defendant in error's counsel apparently admits this position as correct in his brief and and argument, but insists that as plaintiff in error derives both his title and possession from the defendant in error he is estopped to dispute its title, corporate existence or capacity to take as grantee in the deed from the National Land and Improvement Company. It is not true in point of fact that plaintiff in error obtained possession from or through defendant in error. It appears from the testimony of Cowell and the certificate issued to him that he purchased of and obtained possession from the Fountain Colony of Colorado, and that after he had remained in possession a considerable length of time and had made valuable improvements, the deed from the defendant in error was made, containing the condition in question and which is not contained in, or in any manner referred to in the original contract of purchase as evidenced by the certificate of location, under which he entered and took possession and paid the purchase money. In all cases where a party does not derive possession through his grantor, he is not estopped to deny his title. He must obtain not only posssession but title through his grantor to create the estoppel.

Sparrow *vs.* Kingman, 1 Comstock 242.
Gardner *vs.* Green, 5 Rhode Island 104.
Gaunt *vs.* Wainman, 3 Bingham (New Cases) 69.
Averill *vs.* Wilson, 4 Barbour 180.
Asterhout *vs.* Shoemaker, 3 Hill 518.

Small *vs.* Proctor, 15 Mass. 499.

Smiths Leading Cases, v. 2, p. 772, 773,-*665, 666, note to Doe *vs.* Oliver—Dutchess of Kingston's Case.

A party is not estopped, by the acceptance of a deed, to deny the capacity of his grantor to acquire title, as that he was not a citizen or entitled to certain benefits under a certain treaty, etc.

Blights, Lessee *vs.* Rochester, 7 Wheaton 535:

"There is a difference between setting up an adverse title in a third person to controvert an actual existing title and resisting a claim made by a person having no title whatever." —*Ibid.*

"The mere acceptance of a deed when no title passes by it cannot preclude the party from denying his grantor's title."

Sparrow *vs.* Kingman, 1 Comstock 242.

A deed poll can never operate by way of estoppel on the grantee.

Gardner *vs.* Green, 5 R. I. 104.

Smith's Leading Cases, v. 2, p. 773–*655.

The evidence in this case clearly shows that Cowell not only did not obtain his possession from the defendant in error, but that he had no actual knowledge of the contents of the deed or the condition it contained. Its acceptance would not as above insisted, estop the plaintiff in error to deny its title even if accepted, and no title was passed by it, but here it is shown by Cowell's testimony that he never read it and had no knowledge of its contents. Without knowledge of its contents he cannot be said to have accepted the deed.

Price *vs.* School Directory, 58 Ills. 452.

That he knew of its contents is not to be inferred from circumstances as against positive testimony. Beside being in possession under a previous contract not containing the condition, he was not required to signify his non-acceptance

or to take any steps, such as the surrendering of possession to his assumed grantors, who had neither title nor conferred any possession on him.

Counsel for defendant in error assumes that the Fountain Colony of Colorado was the defendant in error, and that it is for plaintiff in error to show it was not. It certainly is not to be inferred that when parties use different names, especially corporations, that they are identical, and it is surely a queer doctrine that when defendant in error claims the benefit of an estoppel he is not obliged to show the facts which create it but his adversary must prove the negative, that they do not exist.

2d. The grantor of the defendant in error, the National Land and Improvement Company, was a non-resident corporation. As such it had no right, to either acquire or hold real estate or to perform any other act within the limits of Colorado except such as was permitted by her laws.

Runyan *vs.* Lessee of Coster et. al. 14 Peters 122.
Bank of Augusta *vs.* Earl, 13 Peters 519.
Paul *vs.* Virginia, 8 Wallace 168, before cited.

This being true a non-resident corporation could not exercise powers in Colorado, such as acquiring and holding lands for colonies, cities, etc., for which purpose resident corporations could have no existence, and were prohibited by law.

Besides admitting that resident corporations were permitted of the kind and for the purposes in question, still a non-resident corporation could neither acquire or hold lands for such purposes in Colorado.

Carroll *vs.* the City of East St. Louis, 67 Ills. 568.

3d. The failure to reserve a right of re-entry in the deed from defendant in error to plaintiff in error, gives the prohibitory clause in the deed only the force of a covenant, as before insisted. Whether a notice to quit was or was not necessary, the action of ejectment cannot be maintained without the right of re-entry. If a party should convey

land with a clause in his deed that only improvements of a certain character should be erected on it, or with any other restriction on its use, the breach of such clause or covenant does not defeat the title of the grantee unless the right to re-enter is reserved to the grantor. Without the right of re-entry the deed is not defeated or the title forfeited.

It would seem unnecessary to make further allusion to the several assignments of error and points made in our original brief from anything urged in defendant in error's brief. The Court below, we think, erred in giving the several instructions given to the jury, as well as in refusing those asked and not given, and in over-ruling the motion for a non-suit and in arrest of judgment, and in admitting and excluding evidence for the reasons heretofore urged.

H. C. ALLEMAN,
Att'y for Plaintiff in Error.

TO. 266.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

'AVID A. COWELL,
Plaintiff in Error,

vs.

'HE COLORADO SPRINGS COMPANY,
Defendant in Error.

Error to Supreme Court, Colorado Territory.

BRIEF AND REPLY OF PLAINTIFF IN ERROR.

H. C. ALLEMAN,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 266.

DAVID A. COWELL, PLAINTIFF IN ERROR,

vs.

THE COLORADO SPRINGS CO., DEFENDANT IN ERROR.

Brief and Argument of Defendant in Error.

IN THE SUPREME COURT
OF THE UNITED STATES.

No 266.

DAVID A. COWELL,
Plaintiff in Error,
vs.
THE COLORADO SPRINGS CO.
Defendant in Error.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

The plaintiff in error contends that the following objections are fatal to the case of the Colorado Springs Company, viz:

(*a*) That the patent to Lamborn, trustee, purports to grant more land than by the laws of the United States can be granted to one person as a pre-emption, and is therefore void.

(*b*) That Lamborn is described as "trustee" in the patent; that such designation implies the existence of a trust and of a beneficiary; that, no beneficiary being named, the law implies the trust to be in favor of the grantor, that is to say, the United States.

(*c*) That no authority appears from the beneficiary to Lamborn to convey the lands in question; and that, the nature of the trust itself not appearing, it is to be presumed that he acted in violation of his duty and in disregard of the trust, when he conveyed the lands, patented to him, to the National Land and Improvement Company.

(*d*) That the Colorado Springs Company had no authority, by virtue of its incorporation, to acquire real estate for the

purposes for which it assumed to act; and therefore took nothing by the deed of the National Land and Improvement Company.

Granting, for argument's sake and for the moment, that the above objections are well founded in themselves, the plaintiff in error is still not the person, who can be heard to urge them.

His possession and title he derived wholly from the Colorado Springs Company. He accepted, and has always claimed to hold under, the company's deed; and has not shown, nor attempted to show, any other or better title in himself than that which he derives from the company. Can he now be permitted to say, that its deed conveyed nothing to him; that it had no right to the corporate franchises it assumed to use; and that its title was tainted at its very source?

If the almost uniform current of decisions have not erred, the law, in accord with good faith, justice and convenience, declares the plaintiff in error to be estopped to raise any of the objections above mentioned.

English vs. Wright, 1 N. J. L. (Coxe), 437.

"In an action of dower the tenant is estopped from questioning the seisin of the husband under whom he himself has purchased and taken a deed."

NOTE.—In this case the defendant's grantor, who took deed under husband, had himself a better title and took the other to extinguish a pretended claim.

Johnson vs. Watts, 1 Jones (N. C.) L. 228.

Defendant is estopped in ejectment to deny the title of party from whom he and plaintiff both derive title, unless he claims under another title and can show a better title in himself than that of plaintiff's lessor, derived, either from the person from whom they both claim, or from some other person who had such better title. It is not a case strictly of estoppel, but one founded in justice and convenience.

To the like effect are :—

Osborne vs. Tunis, 25 N. J. L. (1 Dutcher) 656.

Kissam vs. Gaylord, 1 Jones (N. C.) L. 228.

Miller vs. Larson, 17 Wisconsin 644.

Hart vs. Johnson, 6 Ohio 87.

Dashiel vs. Collier, 4 J. J. Marsh (Kentucky) 601.

Gill vs. Fauntleroy, 8 B. Mon. (Kentucky) 177–185.

Chiles vs. Jones, et. al., 4 Dana (Kentucky) 479–483.

Miller vs. Shackleford, 4 Dana (Kentucky) 264–287-8.

"A party in possession of land can set up no title adverse to that under which he entered. Good faith and long established principles require this."

He is rigidly estopped to resist plaintiff's right to possession acquired under his title, until he has either restored the possession, or by some act of plaintiff or by operation of time acquired plaintiff's title, or until by judgment of eviction he has been released from his obligation to plaintiff.

Ogden vs. Walker, 6 Dana (Kentucky) 420.

"An entry even under an equitable title estops tenant to deny his grantor's or lessor's title, or right to a restitution of possession.

Naglee vs. Ingersoll, 7 Penn. St. 185–195.

The general rule finds this special application, viz., that when grantee's title is derived through a corporation or one acting under statutory authority, he is precluded from questioning the existence of corporation or its right to hold or convey real estate, or the performance of conditions imposed by statute.

Dooley vs. Wolcott, 4 Allen (Massachusetts) 406.

Demandant claimed under an attachment, followed by judgment execution and sale, against a corporation. Defend-

ant claimed, in part, under deed from same corporation, prior in date to attachment of demandant but recorded afterwards.

HELD.—Defendant could not be heard to deny the legal organization of the corporation.

Hart vs. Johnson, 6 Ohio 87.

"Whether the conditions, on which the trustees [under statute] were authorized and required to execute the lease to the ancestor, were performed or not; indeed however defective that title may be, the defendant claiming under it is, in this suit, estopped from denying its legality."

O'Brien vs. Wetherell, 14 Kansas 616.

Condition very similar to the one in this case. Defendants objected that plaintiff never had title and did not by his deed convey any to defendants; because one of the conveyances in plaintiff's chain of title was from a corporation, which could not legally convey.

HELD.—That defendants were estopped to deny plaintiff's title.

The court say, p. 621.

"Where the defendants hold their entire title and possession to certain land from and under the plaintiff, and hold the same under the express condition that no intoxicating liquors shall ever be sold upon the premises, and are to forfeit the premises back to the plaintiff whenever such condition shall be broken, the defendants are estopped, when sued by the plaintiff for the recovery of the premises on the ground of such forfeiture, from denying that the title conveyed to them or to their grantors by the plaintiff was when so conveyed a good title. Upon this principle alone the question now under consideration may be decided against the defendants. While a grantee or one claiming under him may in many cases dispute the title attempted to be conveyed by the grantor, yet the principle contained in the proposition just enunciated, we think, has never been questioned; and many authorities go much further in asserting that

the grantee, or one in privity with him, cannot dispute the grantor's title."

And again :—

"But suppose said corporation transcended its powers, when it purchased, held and sold real estate in Kansas; has any person or authority, except the state, any right to complain or even to question the validity of tne transaction?"

Goundie vs. Northampton Water Company, 7 Penn. St. 233.

The Commonwealth alone can object to the want of capacity in a corporation to hold land, which it was not authorized by its charter to purchase.

The general rule seems to be thus fairly stated—that he who holds and claims under a title cannot repudiate it; he may not enjoy its protection and deny its legitimacy.

A deed conveying an estate. defeasible upon a condition, is in the nature of a lease, so far as the doctrine of estoppel is concerned.

That is to say "the occupant is under an obligation that "he will at some time, *or in some event*, surrender the posses- "sion."

And to such a one the doctrine of estoppel applies.

Osterhout vs. Shoemaker, 3 Hill, 518.

One in possession of a mill located on a canal and claiming title by a deed made by order of court, binding him to keep the canal in repair, cannot escape from this liability on the ground that the order of court was defective, and that no title was passed by the deed.

Woburn vs. Henshaw, 101 Mass., 193.

It is further contended that the Colorado Springs Company could not convey with condition that it could only hold and convey in fee simple, and could claim no forfeitnre of a condition.

By a simple glance at the writers who have treated of the law of real estate it will be apparent that the term "fee simple estate" commonly includes an estate in fee coupled with a condition, and that it is only for the purpose of artificial classification that a conditional fee is distinguished from a fee simple.

We find nothing in the laws of Colorado which limits the estate which corporations may hold and convey to a fee simple. Corporations are empowered to acquire and hold or convey, "by deed or otherwise, any real or personal estate whatever which may be necessary to enable them to carry on their operations named in the certificate."

Rev. St. Col. Cap. XVIII, sec. 2, p. 118.

And "to hold, purchase and convey such real and personal estate as the purpose of the corporation may require."

Rev. St. Col. Cap. XVIII, sec. 43, p. 129.

If the position of plaintiff in error be well taken, a corporation in Colorado cannot lawfully accept or make a lease, mortgage or conditional, determinable or defeasible contract of any kind relating to real estate.

Corporations, we think, in the absence of special restrictions have the same rights to convey which belong to a natural person. It would be singular indeed if having the right to convey the totality of estate, they should not have the right to convey those lesser estates which the necessities or caprices of men have carved out of the integral fee.

But if a corporation have the right to convey with condition, can it enforce a forfeiture?

The question seems to contain its own answer.

If the grantor may lawfully impose the condition he may lawfully avail himself of the means by which the condition may be enforced, by which, perhaps, as in fact in this case, it can alone be effectually enforced. That which is needful to the

enjoyment of a grant goes with the grant. That which is needful to the enjoyment of a right goes with the right.

Where it may be said that a corporation cannot enforce a forfeiture it will, we think, be found that by corporation is meant a political corporation, exercising some of the rights of sovereignty given it by the state, and by forfeiture is meant the *confiscation* of private property, for a political offense, to the corporate representative of the state, instead of the *defeasance* of an estate for condition broken, and its reversion to the grantors.

"We think it may be safely laid down as a rule without "exception that corporations at this day are capable of making "every species of deed."

Angell & Ames on corporations, sec. 220.

Assuming, therefore, that the Colorado Springs Company had the same right to insert the condition in question and to enforce it which a natural person would have had, it remains to consider whether the condition itself be good or whether. as plaintiff in error contends, it be void as repugnant to the grant and contrary to public policy.

"No condition," says Sheppard's Touchstone, p. 129, "that doth contain in it matter repugnant and tending to the "utter subversion of the estate, or matter that is against law, "or matter that is impossible to be done, is good."

"But partial and temporary restrictions as to the use may be consistent with the estate granted, and so may stand."

Gray vs. Blanchard, 8 Pick. (Mass.) 289.

The condition in this case, that liquor should not be sold on the premises, is not utterly subversive of the estate. It does not destroy or even limit its alienable or inheritable character nor its enjoyment. It is not repugnant to the nature of a fee simple to be accompanied by such a condition any more than by any one of the numerous good conditions given as examples in the books.

Sheppard's Touchstone, p. 129-131.

It is not impossible to be done, for it simply requires the grantor to abstain from doing. It is not against the law or public policy, because it is only a partial and local restriction of trade, such as is frequently enforced by the law when agreed upon by parties.

The sale of intoxicating liquors is surely no more protected by the law than the sale of groceries, yet a man may lawfully agree not to sell groceries within certain specified limits, or not to use certain premises for any offensive trade or business. And the grocery business has under certain circumstances been held to be within the restriction. And where lots were sold upon condition to be used for the erection of dwellings alone, a restaurant was prohibited.

Dorr et. al., vs. Harrahan, 101 Mass. 531.

Parker et. al., vs. Nightingale et. al., 6 Allen 341.

So far from the prohibition from selling intoxicating liquors being against public policy, the utmost that can be said in favor of such sale is that the law permits it. But if the law enforces private agreements in partial restraint of the sale of things the most harmless and beneficial, how much more will it enforce such agreements in partial restraint of a trade so noxious that its entire banishment from a town has often been a means of attracting thither the worthiest class of citizens.

And in fact like conditions, the enforcement of which has been sought in just the same way as in this case, have frequently been held valid.

O'Brien vs. Wetherell, 14 Kansas, 616.

The Collins Mfg. Co. vs. Marcy, 25 Conn., 242.

Plumb vs. Tubbs, 41 N. Y., 442.

In Plumb vs. Tubbs, p. 446, Hunt, C. J. says: "This condition is evidently neither unlawful or impossible."

Is it repugnant to the estate granted that its use should be restricted by preventing thereon the sale of intoxicating

liquors as a beverage? The cases in the books are numerous and uniform in holding that the use of the property in some directions may be restricted. A condition that a school house should not be erected on the premises, or a distillery, or a blast furnace, or a livery stable, or a machine shop for iron manufacture, or a powder magazine, or a hospital, or a cemetery, have been held to be valid conditions. (Citing among other cases, 1 Kernan, 315; 2 Kernan, 121.)

Indeed we are almost persuaded that a condition prohibiting the sale of intoxicating liquors on the premises, unless the tenant should likewise maintain thereon a private hospital and a cemetery, would be held good.

A like condition was held good in

Wilson vs. Hart, 14 W. R. 748, L. R. 1 Ch. app. 463.

Richards vs. Revett, 26 W. R. 166.

(Both the above cases are cited in 6 Central Law Journal, page 63.)

The validity of the condition being once admitted, there remains but little of the case of plaintiff in error. Some few of the minor points upon which he relies we now proceed to briefly notice:

1st. We cannot see why the insertion in one patent of more or less land should invalidate the grant.

It does not appear that the patent described any more land than Lamborn was entitled to.

But if such were the case, what then? Can a grantor totally avoid his grant because he has described in his deed more land than the grantee was entitled to receive, or than he, the grantor, was able to convey? Can he avoid it in an action at law? And can it in an action at law be enquired into collaterally?

2d. It is said that Lamborn being called trustee in the patent to him, and the beneficiary not being named nor the trust declared, it must be taken that in conveying to the National Land Improvement Company Lamborn conveyed in breach of his trust, to the detriment of the *cestui-que-trust*, the United States, and that therefore the National Land Improvement Company took nothing by his deed.

To this we answer that the deed of the trustee would in any event, even in breach of the trust, be good enough to convey the legal estate, and that, nothing appearing to the contrary, the law will presume good, not bad, faith, that a trustee conveys in performance, not in violation of the trust; and that it does not lie in the mouth of a stranger to question the act of the trustee, when the beneficiary is content; and that the conduct of a trustee in performance of his trust, while subject to scrutiny in the proper forum, will not generally be investigated by a court of law in an action of ejectment; and finally that to argue that the United States, by its patent, conveyed to Lamborn a naked trust for its use in the face of the express recitals of the patent, is to weave into argument "such stuff as dreams are made of."

But to make these objections, were they even not essentially idle, the plaintiff in error, as we have shown, is estopped.

3d. It is said that the plaintiff in error knew nothing of the condition in the deed to him, and that he was induced to accept it by fraud, and is therefore not estopped to deny the title of his grantor, nor to deny that he is bound by the condition.

There is not the slightest evidence of fraud in the record. M. L. DeCoursey, who delivered deed to plaintiff in error, Cowell, testifies (83 original) that when deed was delivered "there was no conversation." (84 original) "No words passed." Cowell's own testimony (92-93 original) is to the same effect.

No fraud, therefore, accompanied the delivery of the deed, unless there were fraudulent concealment.

But there was none. The company in its circulars had from the beginning announced that such condition would be inserted in deeds. Cowell himself says, (93 original) "I think "I saw circular prohibiting sale of liquor, in Chicago, when I "got certificate of membership." And DeCoursey (83 original) says that he knew of but one form of deed, "the deed to "Cowell is the only form I know of."

But if there was no fraud on the part of the Company, was there at least ignorance on the part of Cowell? There is no evidence of it in the record. All that Cowell himself testifies concerning the deed is as follows: (92-93 original) "Nothing "was said about character of deed. I gave DeCoursey money "and he delivered deed to me. I borrowed money from real "estate man, and borrowed money on the deed. I did not see "it for a year afterwards. * * * I discovered after I had "received deed the covenant. I never knew of any other sort "of deed being executed."

Counsel below inferred in their argument that Cowell had not seen the deed for a year after delivery, and that he had made improvements, etc., in ignorance of the oppressive condition in the deed.

This nowhere appears in his own evidence, nor in that of any other witness. Indeed the testimony of E. C. Kimball contradicts the inference of counsel.

Kimball (88-89 original) says, "Am acquainted with Cow- "ell; was so in 1873; had conversation with him; not particu- "larly about deeds; we talked about the time he was fixing up "saloon in August; he was taking partitions out of staircase. "I halted and asked what he was doing. He replied he was "going to sell whisky; thought it was in joking manner; said

"he was going to open a billiard parlor and saloon; said no "court would sustain the conditions in the deed; said he would "take the chances; somebody would sell liquor if he didn't; "that there was more money in that business than in any other. "The conversation took place prior to the opening."

Now the deed to Cowell (71 original) is dated and acknowledged May 20th, A. D. 1873, and the conversation with Kimball happened in August, 1873. Cowell therefore knew all about the condition within three months at farthest after receiving the deed. Nor does it appear, even by his own testimony, that he did not know it within five minutes after delivery of the deed.

His hostility to the condition was not due to the fact that he had been hoodwinked into taking a deed different from the one for which he had bargained, but was due to his belief that "somebody would sell liquor if he didn't; that there was more money in that business than in any other."

That he was ignorant of the condition is so improbable as to seem almost impossible, A corporation projects the establishment of a colony and publishes as one of the advantages of the scheme that the sale of liquor will be prohibited in the town. Cowell hears of the scheme, and of the proposed prohibition, in Chicago; buys a certificate; comes to Colorado Springs and locates his lots; other deeds are issued to other purchasers before him; they contain the same condition; he himself "never knew of any other sort of deed being executed;" nor did DeCoursey, the secretary and treasurer of the company. What likelihood is there that the condition, if unlooked for, did not provoke loud and hostile comment, which would induce him to scrutinize his own deed before taking it; or, if usual and expected, what likelihood is there, that he supposed the company had made an exception in his favor?

A deed of conveyance cannot in a trial at law be impeached on the ground of fraud.

Vandevier vs. Long, 2 A. K. Marshall (Kentucky)203.
Thompson vs. Drake, 32 Ala. 99.
Canoy vs. Troutman, 7 Ired. (North Carolina) L. 155.
Gwinn vs. Hodge, 4 Jones (North Carolina) L. 168.
Ball vs. Lively, 4 Dana (Kentucky) 369.

4th. Plaintiff in error dryly contends, that he is in possession under a contract with the Fountain Colony, and does not know the Colorado Springs Company; and is therefore not estopped to deny the latter's title.

There is no evidence anywhere in the record, that there ever was any such corporation as the Fountain Colony. The years 1871 and 1872 were the era of "colonies" in Colorado; and, whatever the corporate name of the company having any such scheme in charge, the word "colony" was always attached to the name, by which the scheme itself was advertised. The certificate of incorporation of the Colorado Springs Company recites, that one of the objects of the incorporation is "the establishment and building up of colonies, towns and watering places." It contemplates the possibility of many colonies, which might be distinguished by various local names. The one in question is named from the stream called "the Fountain" in the neighborhood. But no company had ever anything to do with it, except the Colorado Springs Company.

The date of its certificate of incorporation is June 20th, 1871, and the date of the deed from the National Land and Improvement Company to the Colorado Springs Company is March 14th, 1872. The date of the first certificate to Cowell is April 6th, 1872, (94 original). At the date, therefore, of Cowell's first certificate, the Colorado Springs Company owned and was in possession of the premises in question in this suit. William E. Pabor was then secretary of the Colorado Springs Company (81 original).

Nettleton was employed by the Colorado Springs Company June 26th, 1871, and between that date and April and May, 1872, Pabor selected lots. M. L. DeCoursey was employed by the Colorado Springs Company as assistant secretary and assistant treasurer, from February or March, 1872, until August 1, 1873, (83 original). He exercised control, and located lots. No company's name was mentioned in certificate. The Colorado Springs Company located the lots. Cowell himself testifies, (92–93 original), that Pabor signed the location of Cowell's lots, May 15th, 1872; and that he, Cowell, "didn't know of such company as Fountain Colony."

So much for the pretention that Cowell derived his possession from any other grantor than the Colorado Springs Company.

5th. It is also said that, if not an entry, at least a demand for possession is necessary before bringing ejectment for condition broken.

The revised statutes of Colorado (1868) p. 275, section 15, provide that "it shall not be necessary for the plaintiff to prove "an actual entry under title, nor the actual receipt of any of the "profits of the premises demanded, but it shall be sufficient for "him to show a right to the possession of such premises at the "time of the commencement of the suit, as heir, devisee, pur-"chaser or otherwise."

In a like case, under a similar statute, demand was not held necessary.

Austin vs. Cambridgeport Parish, 21 Pick., 215.

Demandant brought writ of entry *sur disseisin.*

The court says, p. 224: "The demandant is no longer "required to prove an actual entry under his title in those cases

"where such entry was necessary at common law, but if he "shows that he is entitled to such an estate as he claims in the "premises, whether as heir-at-law, devisee, or otherwise, and "that he has a right of entry therein, this is sufficient proof of "his seisin."

Rev. St. c. 101, s. 4-8.

The actual entry not being required, demand or notice to quit does not spontaneously take its place. It must be required by virtue of a statute, and we have in Colorado no such statute.

The objection that the jury found the defendant instead of the defendants, guilty, is immaterial, for if the condition is valid then plaintiff was entitled to the premises upon breach, and if either defendant is guilty plaintiff could have judgment. And Cowell cannot now be heard to say (the evidence against him being direct and positive) that the jury intended to find McDowell, but not plaintiff in error, guilty.

The presumption is that the verdict was based upon the facts proved at the trial, and the evidence being equally conclusive as to both defendants, there is no doubt that the verdict was intended to include both, finding, as it also does, that plaintiff is owner in fee.

"The general rule is, that although the verdict may not conclude formally or punctually in the words of the issue, yet if the point in issue can be concluded out of the finding, the court shall work the verdict into form and make it serve according to the justice of the case."

Porter vs. Rummery, 10 Mass., 65.

If, upon notice of the defect, the verdict could have been corrected, the judgment must stand. The objection was not made in proper time.

Henry vs. Halsey, 5 Smeds & Marshall, 573.

Laber vs. Cooper, 7 Wall, 570.

There are two counts in the declaration and it is insisted that they describe different parcels of land.

The judgment is for the premises described in the first count. There are two counts in the declaration and it is insisted that they describe different tracts. If this be so, then as was said by the Supreme Court of Colorado, "the plaintiff alone is prejudiced by a judgment for one parcel instead of two," as the verdict covers both counts.

It is further objected that the second count is bad for uncertainty in description.

This objection should have been made by demurrer, or as provided by the revised statutes of Colorado, p. 509, sec. 25. Sec. 25. "Whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed if any one or more of the counts be good, but if one or more of the counts be faulty the defendant may apply to the court to instruct the jury to disregard such faulty counts."

All of which is respectfully submitted.

F. W. PITKIN,

For Defendant in Error.